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NORTH CAROLINA REPORTS.

VOL. 23.

CASES AT LAW ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA,

FROM JUNE TERM, 1840, TO JUNE TERM, 1841, BOTH INCLUSIVE.

REPORTED BY
JAMES IREDELL.
(Vol. I).

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JUDGES

OF THE

SUPREME COURT OF NORTH CAROLINA,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

CHIEF JUSTICE:

HON. THOMAS RUFFIN.

ASSOCIATE JUSTICES:

HON. JOSEPH J. DANIEL. HON. WILLIAM GASTON.

ATTORNEY GENERAL:

JOHN R. J. DANIEL, ESQ. HUGH McQUEEN, ESQ.

102905

NOTE.—The cases determined at June Term, 1840, and reported in this volume, were prepared and published by William H. Battle, Esq., before his elevation to the Superior Court Bench. The remaining cases were prepared by the present Reporter.

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CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA.

JUNE TERM, 1840.

(9) GEORGE CUNNINGHAM *vs.* NELSON G. HOWELL.

1. An award which was to be a rule of Court, under a reference of the cause to arbitration, may, in this State, be enforced, by entering a judgment upon it for the debt and damages awarded, instead of proceeding on it by attachment.
2. A reference of a cause to arbitration, under which the award is to be a rule of court, will not, in this State, discharge the bail; though it *seems* that in England, when a cause is referred to arbitrators, the bail is discharged, unless a verdict be taken for the plaintiff, to stand as a security for what may be awarded.
3. The nature and effect of the informal entries of judgment in this State, considered, and the mode of avoiding objections to them, pointed out.

The present plaintiff instituted an action of trespass against one Hyatt, and, upon his appearance, the parties, by an order in the cause, referred it to arbitrators, whose award was to be a rule of court. An award was made and returned, that Hyatt should pay to the plaintiff the sum of $155; and there was "judgment for the sum of $155, according to the award."

The present was a suit by *scire facias* against Nelson G. Howell, as the bail of Hyatt in the former action; in which the defendant pleaded, amongst other things, 1st, *nul tiel record;* and 2ndly, the special matter of reference and award above mentioned.

Upon the trial at Haywood, on the last fall circuit, before his Honor Judge PEARSON, it was insisted for the defend-
(10) ant, on his first plea, that there was no judgment of the court in the cause between Cunningham and Hyatt, but merely an award of execution on the award; and upon his second plea, that by the reference to arbitrators the bail was discharged. The case then states, that the court being of opinion for the defendant, judgment was given in his favor, and the plaintiff appealed.

No counsel appeared for either party in this court.

RUFFIN, Chief Justice, after stating the case as above, proceeded as follows: As the parties have not been represented by counsel, we are somewhat at a loss how we are to regard the objection taken under the plea of *nul tiel record*, and the decision made by his Honor. If it was intended to raise the question, whether upon such a reference as that before us, judgment in the cause according to the award is the legal method of enforcing it, instead of an attachment: the answer is, that from a period so early, that none of the profession know when it did not exist, the practice in this State has been to enter a judgment in the cause for the debt or damages awarded. It probably had its origin in consent, as a confession of judgment; which the party preferred to being exposed to process of contempt. But however it arose, it has received the approbation of the courts; and it is now the constant usage (*Simpson* v. *McBee*, 3 Dev., 531); and it is too late to question it as a proper method of proceeding on awards.

It may have been intended to object to the form of the judgment as an entry. If so, it must be admitted to be informal and insufficient in its present shape. But we do not like, and indeed, without the points being unequivocally taken, we cannot assume the objection to be of that kind. The indulgence of the members of the profession towards each other is notorious, as the chief cause why the pleadings and entries in our courts are not more fully and accurately drawn out; and it is not to be believed that gentlemen of the bar could be prevailed on to take an advantage of a laxity in their own practice, which is nearly universal. But if they were so inclined, the courts, we think, would
(11) hardly yield to it, since the Judges would be bound to protect suitors and purchasers under judicial proceedings from an objection of such extensive operation, if legitimate means could be devised to that end. This may be done, by observing the method that has heretofore prevailed; which is, not to consider such an entry as the entry of the judgment, properly speaking, but as a minute of which the import is well understood, and from which the judgment might be formally drawn out. Upon an objection of the kind supposed, the court would, as of course, allow time to make up and engross the record; and, therefore, such minutes have been usually received upon the trial as evidence, as the record would be, were it complete. We must suppose that such would have been the course here, if the objection had been of this character; and, therefore, we infer that it was not; and that the more

readily, because the court did not adjudge distinctly that there was not such a record. We presume, therefore, that the opinion of the court was given on the other point, namely, the effect of the reference on the undertaking of the bail: which we will now proceed to consider.

The point is without authority in this State, as far as the members of the court know. Neither of us recollects any decision on it, nor even its having been raised. We find it, indeed, so stated in the books, that we must receive it as settled law in England, that when a cause is referred to arbitration the bail is discharged, unless a verdict be taken for the plaintiff, to stand as a security for what may be awarded. 2 Saud., 72, a note. It is somewhat remarkable, that in the note in which this passage occurs, Sergeant Williams enumerates several instances of the bail being discharged by acts or inadvertences of the plaintiff, for each of which, except this one of a reference, adjudications are quoted as authority. For this one, neither authority is cited nor reason given. We have not, ourselves, succeeded in our search for an adjudication on the point. It would be more satisfactory if the ground of the rule could be found stated, as it is not so obvious, as not to leave some doubt as to its principle; and, at all events, we should then be better able to judge whether its principle made
(12) it applicable to us here. In England, the courts have always exercised an equitable or summary control over the recognizance of bail, in subjecting or exonerating the bail; and as to bail to the sheriff, the Stat., 4 Ann., c. 16, expressly authorises the courts by rule or rules to give such relief upon the bond as is agreeable to justice and reason; and enacts that such rule or rules of court shall have the nature and effect of a defeasance to such bonds. This relief is an instance of the exercise of this summary jurisdiction; and may have proceeded upon the idea, that the reference interfered with the regular legal progress of the suit, and might therefore be an injury to the bail, in the nature of a giving of time to the principal. Yet there are objections to this supposition, which seem materially to impair its force. It is not, in the first place, understood how the bail can suffer prejudice from the act in question. The determination by arbitration is ordinarially not so dilatory as that by trial by jury, and we are not informed that a reference extinguishes or suspends the power of the bail over his principal, so as to discharge himself by a surrender. But in the second place, by the same passage, it appears that the bail is not discharged by a reference, provided a verdict, though by consent, be taken as a security; for upon

it, after the award, judgment is entered up and execution sued, precisely as in other cases of verdicts, and all the usual remedies pursued against the bail. 2 Saund., 72, a note; *Lee* v. *Lingaird*, 1 East. R., 403. Now, the objection that the time has been enlarged by the plaintiff, seems to be just as applicable to one of those cases as to the other. It may affect the interests of the bail as materially, for the plaintiff to stay the proceedings after verdict, as before trial, by a reference. We are therefore not satisfied, that this is the reason of the rule; but suppose that it may rest on some other.

It has occurred to us, that perhaps the rule may have had its origin in the nature of the remedies on awards in the English Courts. They are, attachment for contempt by the suitor in not obeying the rule of court to perform the award; or an action on the submission or on the award; or entering judgment on the verdict taken as a security, and then raising by execution
(13) thereon the sum awarded. But there never is judgment in the cause referred on the award, or "according to the award." Then, except in the case of a verdict, there is no judgment in the action, in which the bail undertook for his principal, and, consequently, there is no condemnation for which the bail bound himself to be liable: and in the excepted case of a verdict and judgment, we have seen that the bail is liable, and is constantly proceeded against, as on judgments ordinarily.

But whether the rule in England rest on the one or on the other foundation, it ought not, we think, to prevail in this State, because here, neither of those reasons has any application.

The power of the bail to surrender the principal, the periods and the places at which he may do it, and the consequences of the surrender, are not, with us, dependent upon rules of court which may be varied from time to time, nor even upon general reasons of right and justice; but they all arise out of a fixed statute law. It may be, in England, that the plaintiff is bound not to act against the defendant, while the proceedings are staid by a reference; and that during the same period, the bail also is in like manner restrained. But certainly it is not so here. The act of 1771, provides that the bail shall "*at any time before final judgment*," have power to arrest the principal to surrender him.

So, besides the English remedies on awards, it is the settled usage and must now be taken to be law, that the plaintiff may take judgment in the original action for debt or damages awarded, as well where the reference is without, as when it is after a ver-

dict. There is then a condemnation of the defendant, of record, which brings the case within the contract of the bail to pay the money, if the principal should not pay it or render himself a prisoner. We think, therefore, that the bail cannot be set free from his contract; no stipulation of which, in its letter or spirit, appears to be violated by the reference.

The judgment must be reversed, and the case go to another trial.

PER CURIAM. Judgment reversed.

---

(14) THE STATE *vs.* NOAH SMITHERMAN AND JAMES HETHCOCK.

Under the 69th section of the Revised Statute "concerning crimes and punishments" (1 Rev. Stat., ch. 34, sec. 69), an indictment will not lie against one for playing at a game of cards in a tavern, if he do not bet on the game, though the other persons with whom he may play, may bet. The Statute embraces two cases, the playing *and* betting at cards in a tavern, and the merely betting upon a game played by others, but does not reach the case of playing only without betting.

These defendants, with two other persons, Tyson and Guthrie, were indicted at Randolph, on the last circuit before his Honor Judge DICK, for playing cards in a tavern and betting money thereat. On not guilty pleaded, the jury found Tyson and Guthrie guilty. But as to the defendants, Smitherman and Hethcock, the jury found specially, that the four played together at divers games of cards in the house of one Hoover, then a tavern, and that Tyson and Guthrie bet money on the games then and there played, and that in those games so played, Smitherman was the partner of Guthrie, and Hethcock of Tyson; but that neither Smitherman nor Hethcock did bet any money or property with any person on such games.

On this verdict judgment was entered for these defendants, and the Solicitor for the State appealed.

The Attorney General for the State.
Mendenhall for the defendants.

RUFFIN, Chief Justice, after stating the case as above, proceeded as follows: The question arising on the record is, whether it be a misdemeanor to play at cards in a tavern, when the player does not, but another person does, bet on the game; and upon looking into the statute, we are of opinion, that there is, at present, no law making such playing a crime.

The only law now in force, that bears on the case, is found in

the 69th section of the "act concerning crimes and punishments." 1 Rev. Stat., ch. 34. That enacts, that "every person
(15) who shall *play* at any game of cards in a tavern, *and bet* any money or property, whether the same be in stake or not, shall be deemed guilty of a misdemeanor, and that every person *who shall bet* on any such game so played, shall be guilty of a misdemeanor." The act then, in its terms, provides for two cases: The first, playing *and* betting: The second, betting by itself. But the case of *playing*, by itself, or that of playing games on which *others* bet, is not within the words of the section, nor, apparently, is it within the meaning of the Legislature, except so far as it may be supposed to fall among the mischiefs which ought to be suppressed: and if that were yielded, the court could not extend a statute of this character beyond the fair force of its words. But when recurrence is had to the laws, as they were expressed before the revision, it will be seen at once, that the court is restricted to this construction of the Revised Statute.

The 69th section is taken from the act of 1799, Rev. L., ch. 526; and is expressed in the words of the first part of that act, except that it adopts the provision of the act of 1801, Rev. Laws, ch. 581, that the offence shall be punishable as a misdemeanor by indictment, instead of information before a justice of the peace for a penalty. But that is not the only provision of the act of 1801. It makes other important alterations of the law; particularly one which we think would have reached this case, had it been incorporated into the Revised Statute. That act of 1801, provides in the first part of it, that a tavern keeper who suffers any of the forbidden games to be played on his premises, or who furnishes the players with refreshments, shall be deemed guilty of a misdemeanor. Then, in the second part of the act, follow these words: "and every person *playing* at any of the said games, in manner above described, shall be deemed guilty of a misdemeanor." Now, as by the first part of this act, a tavern keeper was guilty who suffered in his house any game of cards, on which *any* person betted, whether such betters were the players or others; so under the subsequent clause, it would seem to follow, that *every* person *playing* at any such game would likewise be guilty, if *any* persons bet on the game, whether such betters be the players or others. But if this was
(16) the correct construction of the act of 1801, it cannot affect the present case; for that part of the act is not transferred to the Revised Statute, and the omission, whether

designed or inadvertent, is fatal to this indictment. Under the act, as it now stands, betting by the party charged is an essential part of the offence, whether that person or another be the player. The judgment of the Superior Court was therefore right.

PER CURIAM. Judgment affirmed.

SAMUEL B. POPE *vs.* ANDREW J. ASKEW.

Testimony as to handwriting, founded on what is properly termed a comparison of hands, seems now to be generally exploded: And the only admissible testimony of handwriting is, that of a witness who has acquired a knowledge of the party's handwriting from having seen him write, or from having had a correspondence with him upon matters of business, or from transactions between the witness and party, such as the former having paid bills of exchange for the latter, for which he has afterwards accounted.

This was an action on the CASE for publishing a libel, trial at Hertford, on the last circuit, before his Honor Judge PEARSON.

To prove that the defendant had written the libellous letter, the plaintiff called a witness by the name of Alexander, who stated to the court, that he had only seen the defendant write on one occasion, when he wrote a contract between himself and the witness; that he had then noticed the manner in which the defendant handled his pen; that on another occasion he had received a note from the defendant, and observed the handwriting; and that he had thus acquired a knowledge of the general character of the defendant's handwriting. The defendant's counsel objected to his being examined in chief, but he was admitted by the court, and testified to the jury that from
(17) his general knowledge of the defendant's handwriting, acquired in the manner stated to the court, he believed the letter in question was in the handwriting of the defendant.

The plaintiff then called a Mr. Anderson, who stated to the court that he had never seen the defendant write; that he was about fifty years old, and had been a merchant from the time he came of age, and that he had paid much attention to handwriting in the course of his business, and believed that by the knowledge thus acquired, he could, by a comparison, tell any man's handwriting: that he had once received a letter, addressed to himself, purporting to be written by the defendant; and, in consequence of its abusive character, had taken particular notice of the handwriting. Here he was asked by the defendant's counsel, if he knew that the letter addressed to him was written by the defendant; to which he replied, that he did not, of his own knowledge. The plaintiff's counsel, by the permission of the court, then called

another witness, who swore that the defendant had told him that he had written the letter addressed to Anderson, and sent it by a negro boy. The witness, Anderson, then stated, that from his skill in the knowledge of handwriting, the first time he ever saw the letter in question, which was at the office of the Old Dominion, in Petersburg, Va., he was confident, from his recollection of the character of the handwriting of the letter addressed to him, that that letter, and the letter in question, were written by the same person; and, that by a subsequent comparison of the handwriting of the two letters, his belief was confirmed. This witness was then permitted by the court, although objected to by the defendant, to give evidence to the jury. He stated, that from his knowledge of the general character of the handwriting of the letter addressed to him, acquired in the manner stated to the court, he believed that the same person wrote both.

The contract between Alexander and the defendant was then shewn to the witness, and he was asked if, by comparing the contract, the letter addressed to him, and the letter in question, his skill in handwriting would enable him to say whether they were written by the same, or by different persons; to
(18) which he answered that it would: And he was then permitted by the court, the defendant's counsel objecting, to give evidence to the jury. He stated that upon comparing them, his skill enabled him to say, that he believed the same person had written all three.

The defendant then called three witnesses, who deposed that they were acquainted with the defendant's handwriting, from having seen him write; and that they did not believe the letter in question was in his handwriting. One of them stated that the letter to Anderson was not, except the signature, written by the defendant.

The case was then, after full argument on both sides, submitted to the jury, who, after retiring a short time, returned into court, and desired to take out with them the contract, the letter addressed to Anderson, and the letter in question; but this was not permitted by the court. The jury then stated that two of the witnesses had differed in their testimony, as to whether the letter "J," and also the letter "P," were made alike in the contract and the letter addressed to Anderson; and they wished, by inspection, to judge which witness was right. The court thereupon permitted the jury, in its presence, and for this special purpose, to compare the particular letters mentioned in the papers referred to—telling them, at the same time, that they were not

permitted to look at the other parts of the writing, lest they might decide as to the handwriting by a comparison of their own, which they had no right to do.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

No counsel appeared for the defendant in this court.
Iredell and *A. Moore* for the plaintiff.

GASTON, Judge. Upon the best consideration which we have been able to give to this case, we are of opinion that a portion of the testimony offered by the plaintiff on the trial, and objected to by the defendant, was improperly received.

The fact in contestation was, whether the libel in question was written by the defendant or not. There was no direct evidence of the fact, and the plaintiff undertook to establish it by proving that the handwriting of the libel corresponded with
(19) the character of the defendant's writing. For this purpose, he introduced, amongst others, a witness, Mr. Anderson, whose judgment, because of his skill and experience in subjects of this kind, was represented as entitled to great confidence. This witness had never seen the defendant write, and had been furnished with no means of judging of the character of his handwriting, further than that he had once received a letter purporting to have been written by the defendant, and in consequence of its abusive character, had paid much attention to its handwriting. To furnish, then, a foundation for getting the judgment of this witness upon the character of defendant's handwriting, another witness was permitted to testify that the defendant had admitted that *he* wrote the abusive letter to Anderson; and thereupon the latter was received to declare that, from his judgment of handwriting, the libel was written by the same person who wrote the letter. In a previous part of the trial, a witness, Mr. Alexander, had testified to the general character of the defendant's handwriting, derived from seeing him write a contract with himself. This contract was exhibited to the witness, Anderson, and he testified that the contract and the libel were written by the same person. Now it may be, that this evidence did not prejudice the truth, or it may have actually contributed to its elucidation in the case under trial; but we feel a strong conviction that the admission of it went beyond the bounds of what has been heretofore allowed with us in disputed questions of handwriting, and apprehend that if generally allowed, it would lead to much legal inconvenience, and tend to the perversion of justice. Upon *this* we rest our decision.

A question very nearly resembling the present, has been recently discussed in the Court of King's Bench in England, in the case of *Doe on dem. of Mudd* v. *Suckermore*, 5 Adol. & Ellis, 793 (31 Eng. Com. Law Rep., 406.) All that learning and ingenuity can contribute to the elucidation of it, may be there discovered.

Testimony as to handwriting, founded on what is properly termed comparison of hands, seems to be now generally exploded.

(20) The testimony now received, is that of the belief of a witness as to the identy of character between the writing in question, and the exemplar of the party's handwriting in the mind of the witness, which exemplar has been formed upon previous sufficient means of observation. The enquiry is, what does the law hold to be these adequate and sufficient means of observation? The rule, as heretofore observed with us, has been, that the witness must either have seen the party write, or have obtained a knowledge of the character of his writing, from a correspondence with him upon matters of business, or from *transactions* between them, such as having paid bills of exchange for the party for which he has afterwards accounted. 2 Star. on Evid., 372. These *prima facie* have been held to be sure means of acquiring knowledge—but means short of these have been deemed inadequate to afford the opportunity of knowing a man's handwriting. It may be asked, why this precise distinction? What difference is there between the knowledge of handwriting acquired from observing writings proved to be those of a party, and observing those which the witness has himself seen written? Do not they all, if really written by him, furnish precisely the same means of judging to the witness? Waiving other answers, we say, in the first place, that it is indispensable to the uniform administration of justice that there should be some *definite* rule for ascertaining when the witness's belief—for it is but belief—has been formed under such circumstances as entitle it to confidence; and whenever the rule has been once fixed, it is dangerous to depart from it because of speculative notions. But we further answer that, if it be admitted that all instruments written by a man furnish the same means of acquiring a knowledge of the character of his writing, (an admission which is not to be made without many qualifications,) yet it is first necessary that it shall be *known* that they were so written, before any opinion founded on them, can be entitled to the least confidence. In the cases put by the rule, the law supposes, *prima facie* at least, that this preliminary matter of fact is

known—but, in all other cases, it is to be proved. How is this to be done? By testimony—direct or indirect—met, opposed, weakened, strengthened, repelled or established by other
(21) testimony—and this upon a number of collateral issues, of which no previous intimation had been given—embarrassing the jury, surprising the parties, and unfitted to the simplicity and distinctness which should characterise the trial of facts by the country. The case before us, is an illustration of the necessary consequences of a relaxation of the rule. The question of fact by whom *the letter* was written, is as fiercely contested, as the fact directly in issue upon the writing of the *libel*—and yet *that* question must be decided in the affirmative, before much of the evidence upon *this* ought to be considered by the jury. Nor is *this* answer met by the objection that, according to the rule, however strictly held, these collateral issues may, nevertheless, be introduced; for it may be, that the party whom the witness supposes that he saw write, was personated by another—or that the correspondence from which he has drawn all his knowledge, was conducted by a clerk, in the name of his principal. This is indeed possible. But the rule so restricted, does not lead to such issues; whereas, the relaxation of it renders them inevitable.

We think it unnecessary to enquire whether the comparison of the two particular letters in the contract, and in the letter to Anderson, were admissible for the special purpose mentioned, because we see no legitimate purpose for which either of these instruments was received in evidence.

The judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

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(22) THE STATE *vs.* ELISHA KING et al.

Under the "act concerning writs of *Quo Warranto* and *Mandamus*" (1 Rev. Stat., ch. 97), the defendant, though judgment is given for him, cannot recover his costs against the relator, where the public only is interested; for the act, though general in its terms, must be confined to those cases only where the relator claims some office or franchise, and has therefore a personal interest in the suit.

Upon the petition and affidavit of John Clayton, a mandamus was awarded by the Superior Court of Buncombe, commanding the defendants to lay off and expose to sale the lots of the town of Hendersonville, in obedience to an act of the General Assembly and the order of the County Court made pursuant thereto, appointing them commissioners for that purpose, or to show

cause to the contrary. To this writ, several returns were made by the defendants; but afterwards, without any formal pleadings, the facts were agreed upon, and a case submitted to the court, who awarded a peremptory mandamus. From this sentence, there was an appeal to the Supreme Court, where the judgment below was reversed, and the cause remanded for further proceedings. In the Superior Court, on the last circuit, before his Honor Judge HALL, the application was di-missed, and, on motion of the defendants, it was adjudged that the defendants should recover their costs of John Clayton, the relator, to be taxed by the clerk of the court. From that judgment, he appealed to the Supreme Court.

The Attorney General for the relator.

No counsel appeared for the defendants in this court.

GASTON, Judge, after stating the case as above, proceeded as follows: A mandamus is the appropriate remedy, to compel inferior courts and officers, and sometimes private persons, to perform certain acts of a public nature, or having connexion with a public duty. At the common law, after a mandamus issued, no costs were to be paid or received, the King being considered the prosecutor; nor could the return to a mandamus be contradicted. But, as it not unfrequently happened that the act required by the writ, though of a public nature, or con-
(23) nected with a public duty, materially affected individual or private rights; it was lawful for any person aggrieved by a false return to the mandamus, to bring his action on the case for damages, and in that action, costs were recovered by the successful party. By the statute of 9th Anne, ch. 20, it was enacted, that where persons who had a right to the offices of Mayor, Bailiff or Portreve of a town corporate or borough in England or Wales, or to be burgesses or freemen of such town or borough, were illegally turned out of their offices or franchises, or refused to be admitted thereto, and a writ of mandamus should issue for their restoration or admission, it might be lawful for them to traverse all or any of the material facts contained in the return to the mandamus, and then the person or persons making the return, might reply, take issue, or demur to such traverse; and such further proceedings should be had therein, for the determination thereof, as might have been had, if the person or persons suing the mandamus, had brought his or their action on the case for a false return; and it was provided, that if thereupon judgment should be rendered for the person or persons suing the mandamus, he

or they might recover damages and costs, in such manner as he or they might have done in such action on the case, and also have a peremptory writ of mandamus, without delay; and, on the other hand, that if the judgment should be rendered for the person or persons making return to such writ, he or they should recover costs of suit. This statute was not in force in this State; but in the session of 1836–'7, an act was passed (1 Rev. Stat., ch. 97, title Quo Warranto and Mandamus), which was evidently modelled after this statute, and which contains, in many respects, the same provisions. Indeed, the only substantial difference between the statute and the act, on the subject of the mandamus, is that, in the act, these provisions, instead of being restricted to cases where a mandamus is sued for restitution of, or admission to, a corporate office or franchise, are, in general terms, applicable "to *any* writ of mandamus." The judgment, therefore, which was rendered below, is warranted by the words of the act; but we are of opinion that it is not warranted by the sense of the act. The provision that, after a tra-

(24) verse of the return, if a verdict be found for the person suing such writ or judgment given for him, he shall recover his damages and costs, "as he might have done in an action on the case for a false return," is obviously confined to those cases in which the writ has been sued out to enforce some individual or private right, alleged to have been injuriously violated or withheld, where damages may, in truth, be sustained by the false return; and the converse provision, "that in case judgment shall be given for the persons making such returns, they shall recover their costs," ought, we think, to be restricted in its application to those cases only. In the case before us, the individual called the relator, claimed no office or franchise, set up no private right, complained of no personal injury, and for aught that appears on the record, had no interest whatever in the controversy other than such as was common to him with the other citizens of the State. The costs of such a controversy must be defrayed as they were at common law.

PER CURIAM. Judgment reversed.

RALEIGH AND GASTON RAIL ROAD COMPANY *vs.* KIMBROUGH JONES.

Upon the confirmation, by the County Court, of the report of the commissioners appointed by said court to assess the damages sustained by the owner of land for its condemnation to the use of the Raleigh and Gaston Rail Road Company, no appeal to the Superior Court is given to the company by

their charter of incorporation, nor does the case come within the provisions of the general law in relation to appeals from the County to the Superior Court.

This was a proceeding, by the plaintiffs, under the 12th, 13th and 14th sections of their act of incorporation (see 2 Rev. Stat., pages 302, 303 and 304), to have the land of the defendant condemned for their use. Upon the return of the report,
(25) by the commissioners assessing the damages to be paid to the defendant, exceptions were filed to it by the plaintiffs, which were overruled by the court, and the report was confirmed and ordered to be recorded, and the plaintiffs prayed for an appeal to the Superior Court, which was granted them. In that court, on the last circuit, at Wake, before his Honor Judge NASH, the defendant moved to dismiss the appeal, upon the ground that no right of appeal was granted in the act of incorporation, and that the case did not come within the provisions of the general law in regard to appeals. His Honor *pro forma* sustained the motion to dismiss, and the plaintiffs were allowed an appeal from this order to the Supreme Court.

Badger for the plaintiffs.
W. H. Haywood for the defendant.

GASTON, Judge. We are of opinion that the Superior Court did not err in dismissing the appeal.

On examining the provisions in the act of incorporation, relative to the proceedings to ascertain the damages sustained by a proprietor from the condemnation of his land for the use of the company, they will be found to confer on the County Court an authority limited in extent, but final in its character. They authorise and require of the court, upon the application of the company (sec. 12)—or of the proprietor—(see sec. 19) "to appoint five disinterested and impartial freeholders" to assess these damages. On a return of the report of these commissioners, "it shall be confirmed by the court and entered of record." But if the report be disaffirmed, or if the freeholders cannot agree, or should fail to make a report within a reasonable time, "the court may supersede them, or any of them—appoint others in their stead—and direct another view and report to be made." The matter in controversy between the parties, "the damages sustained by the condemnation," is not one of which *jurisdiction* is given to the *court*. Upon that matter, the law gives the court no authority to pass. The powers granted to the court amount to no more than the right to appoint the tribunal which shall

pass upon the matter in dispute—and in a limited degree, a supervision over that tribunal, in order to quicken its
(26) action, or to set it aside when irregular or wrongful. The report of the commissioners must indeed be submitted to the court, and cannot be put of record until it is by the court approved. But when so recorded, it declares not the sentence, judgment, or decree of the court—but *merely* the award—or inquest of the commissioners. The enactment in our statute regulating "appeals, and proceedings in the nature of appeals," which allows to any person, plaintiff or defendant, or interested in a suit, to appeal from any judgment, sentence or decree of the County Court, has, it seems to us, no application to the finding of a special tribunal merely recorded in a County Court.

It is apparent, too, we think, that it was designed by the Legislature that the finding of the freeholders, when admitted of record by the County Court, should be final. The 16th section is almost express to that effect: "On the confirmation of such report, and on payment or tender to the proprietor of the land, of the damages so assessed, or the payment of said damages into court, when, for good cause shewn, the court shall have so ordered it, the land reviewed and assessed as aforesaid, shall be vested in the Raleigh & Gaston Rail Road Company, and they shall be adjudged to hold the same in fee simple in the same manner as if the proprietors had sold and conveyed it to them." The mode of proceeding was intended to be summary, cheap and expeditious—all which purposes would be frustrated by allowing to either party the unlimited right of appeal. Besides, while the Legislature may have thought the justices of the County Court, because of their knowledge of the freeholders of the county, a very competent body to select such of these freeholders as were best qualified to make the assessment of damages, *non constat* that they supposed the legal learning of the Judge of the Superior Court would supply the defect of this personal knowledge, and enable him to make a more judicious selection. No provision is made for the trial of the question of damages at bar. If the report of the commissioners be set aside, the act contemplates the appointment of new commissioners to view the land and report the damages.

In addition to these reasons for believing that the Legis-
(27) lature did not intend to give the right of appeal, from the final action of the commissioners in the County Court, or of that court upon the report of the commissioners, we are

confirmed in this belief, by observing, that in analogous cases where the appeal was intended, the Legislature have expressly given it. Such is the case with respect to the mode of ascertaining damages of persons injured by the erection of public mills—so also in controversies about appointing or settling ferries—and on petitions for laying out or altering public roads.

In saying that there is no appeal given by the act of incorporation, we are not to be understood as holding that the Superior Court has not the power to correct injustice, or to rectify error in the proceedings under this act, upon a proper case being presented requiring the exercise of such a power. This control over the action of inferior tribunals, essentially belongs to that court, and is indispensable to the administration of justice. But the parties have not the right respectively, at their pleasure, to vacate the award in the County Court by an appeal therefrom.

The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

THE STATE *vs.* DAVID McC. GARDINER.

1. An indictment for forging a bond against one of the obligors therein, may allege the forgery of the whole instrument by him.
2. An indictment charging the forging of "a certain bond," instead of a certain paper writing purporting to be a bond, is proper.

The defendant was charged at Lincoln, on the last circuit, before his Honor Judge SETTLE, upon the following bill of indictment:

"The jurors for the State, upon their oath present, that David McC. Gardiner, late of, &c., on, &c., with force and arms
(28) in, &c., of his own head and imagination, did wittingly and falsely make, forge and counterfeit, and did wittingly assent to the falsely making, forging and counterfeiting a certain bond and writing obligatory in the words, letters and figures, that is to say:

'Four months after date, with interest from the date, we or either of us do promise to pay Ephraim Manney, or order, the sum of twenty-four dollars and thirty-eight & 3-4 cents, for value received of him, as witness our hands and seals, this 19th day of June, 1839.

DAVID McC. GARDINER, (Seal),
A. GARDINER, (Seal),
JOHN VICKERS, (Seal),'

with intent to defraud the said Ephraim Manney, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

After a verdict of guilty, the defendant's counsel moved in arrest of judgment, which being refused and judgment pronounced, the defendant appealed.

No counsel appeared for the defendant in this court.

The Attorney General for the State.

RUFFIN, Chief Justice. As the grounds of the motion in arrest of judgment are not stated in the record, and the court has not had the assistance of counsel for the prisoner, it is possible we may have overlooked some point on which the motion ought to have been allowed. If so, it will be a source of sincere regret; for in the absence of counsel of his own selection, the court has endeavoured to discharge for the prisoner that office, which, as a public duty, is devolved on us. After a careful examination of the record, we are unable to discover any reason why the sentence of the law should not follow the conviction.

In considering the case, however, one or two points have suggested themselves, on which it may be supposed an objection might have been taken; and on which, therefore, the court may properly give an opinion.

As the name of the prisoner and that of one of the supposed obligors in the forged instrument appear to be the same, it may have been intended to present the question, whether the
(29) indictment can allege the forgery of the whole instrument by one of the parties to it? To that, we think, there would be several answers. One, that the objection ought to have been taken on the evidence, and cannot be taken in this manner; since it does not legally follow that the prisoner is the same person with the supposed obligor, although the names be the same. But admitting the identity of those persons, yet secondly, that will not vitiate the indictment. The forgery may have consisted of alterations of a true instrument, as by making the sum mentioned in the bond more or less than it was at first, or by adding the names of the other two obligors without their knowledge or consent, and that of the obligee. Now, it is a settled rule, that in such cases the forgery may be charged specially, by alleging the alterations; or the forgery of the entire instrument may be charged; and this last will be supported by evidence of the alteration. *Rex* v. *Elsworth*, 2 East P. C., 986,

988. After the alterations, the instrument as a whole, is a different instrument from what it was; and therefore, in its altered state, is a forgery for the whole.

Possibly, the prisoner's counsel meant to object to the indictment, as a repugnancy, that it charges the forgery of a certain *bond;* whereas if it be a forgery, it is not a bond, but only purports to be such. But that objection too, would be untenable. The statute uses the same language: "forge any deed, will, bond, &c.," and while it is prudent, so it is generally safe, to follow in the indictment, the words of the statute. Besides, upon looking to the precedents, in books of criminal pleading, it is found, that in this respect the present indictment conforms to those long settled.

Without further lights as to the points intended to be relied on for the prisoner, the court is therefore under the necessity of saying, that there is no error in the judgment, and directing the steps necessary to its execution.

PER CURIAM. Judgment to be affirmed.

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(30) THE STATE *vs.* WILLIAM STALCUP et al.

In an indictment for a riot, it is necessary to aver, and on the trial, to prove a previous unlawful assembly: And, hence, if the assembly were lawful, as, upon summons, to assist an officer in the execution of lawful process, the subsequent illegal conduct of the persons so assembled, will not make them rioters.

This was an indictment containing two counts against the defendants, William Stalcup and three others. The first count, charged them with a riot, in unlawfully assembling and beating one Morrison, the prosecutor; and the second, with a common assault and battery upon the said Morrison.

Upon the trial at Macon, on the last circuit, before his Honor Judge HALL, it appeared that a State's warrant had been issued by a magistrate of Macon county, directed to one of the defendants, a constable of said county, commanding him to arrest the body of the prosecutor, Morrison, for a forcible trespass. By virtue of this warrant, the constable, accompanied by the other defendants and some other persons, all of whom had been summoned by him to aid in executing the process, went to the place where the prosecutor was at work, and arrested and tied him. Evidence was then offered to show that the defendants, under color of the said process, had acted oppressively towards the prosecutor, and had unnecessarily abused his person. The coun-

sel for the defendants, insisted, that although the evidence might warrant the belief that the defendants had so oppressed and abused the prosecutor, yet that they could not be convicted on the first count of the indictment, and asked the court so to instruct the jury. The court declined giving the instruction prayed, but, on the contrary, informed the jury, after giving them the legal definition of a riot, that if they believed, from the evidence, that the defendants were guilty of such oppression and abuse, they might convict them upon both counts.

The jury returned a verdict of guilty upon both counts, and, after an ineffectual motion for a new trial, the defendants appealed.

The Attorney General for the State referred to 2 Chit.
(31) Crim. Law, 488, and note thereto; Hawkins, Book 2, ch. 65; *Branch* v. *Bradley*, 2 Hay. Rep., 53; Hobart's Rep., 62, 264.

No counsel appeared for the defendants in this court.

DANIEL, Judge. The case states that the defendants assembled, in consequence of the summons of the officer to aid him in the execution of a State's warrant, issued against the prosecutor, for a forcible trespass. Such an assembly cannot be considered an unlawful assembly. But, we think, an unlawful assembly is a constituent and a necessary part of the offence of a *riot*. It must precede the unlawful act which consummates the offence of riot. Hawkins accordingly defines a riot to be a tumultuous disturbance of the peace, by three persons or more, assembling together of their own authority, with an intent mutually to assist one another against all who shall oppose them, and afterwards putting the design into execution, in a terrific and violent manner, whether the object in question be lawful or otherwise. An indictment for a riot, always avers that the defendants, unlawfully assembled. And this averment must (we think) be proved on the trial, as well as the subsequent riotus acts of the defendants, before they can be convicted of a *riot*. *Rex* v. *Birt*, 5 Carr. & P., 154; Archb. Crim. L., 446, (5 edition.) The judgment therefore must be set aside, and a new trial awarded, because the defendants have been improperly convicted on the first count in the indictment.

PER CURIAM. Judgment reversed.

(32) THE STATE *vs.* WILLIAM WILSON et al.

1. On an indictment for a riot, it is only necessary to prove the possession of the prosecutor, and that may be done by parole evidence, without the production of any paper evidence of title.

2. An indictment charging a riot and forcible trespass to the land of one, cannot be supported by proof that the land belonged to him, but was then in the possession of another as his tenant. It ought to have charged the trespass to have been to the land in the possession of the latter.

The defendants, seven in number, were indicted at Yancey, on the last circuit, before his Honor Judge HALL, for a riot and forcible trespass. The indictment contained three counts. The first charged that the defendants unlawfully assembled to disturb the peace, and did unlawfully and riotously pull down and destroy a mill-dam of one George Byrd. The second count charged that the defendants unlawfully assembled to disturb the peace, and did riotously cut away and destroy a part of a mill-dam in the possession of one Malcom Horton. The third count was for a wilful trespass in destroying a mill-dam in the possession of Malcolm Horton, and in the presence of the said Horton.

Horton, who was the prosecutor, was in the possession of the mill-dam at the time of its demolition, and had lived on the land on which the dam was situated for some time before, as the tenant of Byrd, to whom the land belonged. It appeared that the defendants came to the dam, and in the presence of Horton and against his will, cut away thirty feet of it, as low as the mud sills.

His Honor charged the jury, that if the dam was in the possession of Horton, and was the property of Byrd, and the defendants cut away the dam in a violent and tumultuous manner, they were then guilty upon the first and second counts of the indictment. And if the prosecutor was in the actual possession of the dam, and the defendants cut it away in his presence, and against his will, they were guilty on the third count. The defendants then prayed the court to instruct the jury, that the ownership of the land and mill-dam by Byrd, and the possession by the prosecutor, could only be proved by the production of the
(33) title papers; but the court refused so to charge. The jury returned a general verdict of guilty on all the counts; and a motion for a new trial having been submitted and overruled, the defendants appealed.

No counsel appeared for the defendants in this court.
The Attorney General for the State.

DANIEL, Judge, after stating the case as above, proceeded as follows: The law owes its protection to the citizen in the quiet and peaceable possession of his houses, fences, fixtures, &c., against the unlawful acts of rioters. The State is never called upon, in an indictment for a riot or trespass, to establish a pos-

session by a paper title; parole evidence of such a possession is sufficient. But we think the Judge erred in his charge, when he said that if the jury believed that the dam was in the possession of Horton, and was the property of Byrd, the defendants were guilty on both the first and second counts. The evidence, we think, was applicable only to the second and third counts: but not to the first. Byrd had but an interest in reversion; and therefore the dam is improperly charged to be his. It belonged in law to him who was in the immediate possession, and that was Horton. The conviction on the first, and the conviction on the second count also, on the same evidence, are inconsistent; and the direction of the court that the same evidence would authorise them to find the defendants guilty on both these counts, and also on the third count, seems to us to be erroneous. The judgment must be reversed and a new trial granted.

PER CURIAM. Judgment reversed.

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(34) DEN ON DEM. OF JOHN PURCELL *vs.* TRYON MCFARLAND'S HEIRS.

Where the Clerk of a Superior Court has omitted to affix the seal of his court to writs of *fi. fa.* and *venditioni exponas* issued out of the county, the court may, at a subsequent term, order the clerk to affix its seal to the said executions *nunc pro tunc*, in order to protect a purchaser of the land sold under them, where no third person claiming under one of the parties to the execution is to be affected thereby.

Upon a judgment obtained in the Superior Court of Robeson county, against one John McFarland, a writ of *fieri facias* was issued, directed to the Sheriff of Richmond county, and was by him levied on the land in question, as the property of the said John McFarland. The *fieri facias* was returned, and a writ of *venditioni exponas* issued, under which the land was sold, when John Purcell became the purchaser, and received a deed from the sheriff for it. An action was then brought in the county of Richmond, by the purchaser, to recover the possession of the land from the heirs of one Tryon McFarland. On the trial of that suit, an objection was taken that the clerk, who issued the writs under which the land had been levied upon and sold, had neglected to affix the seal of the court to them; whereupon the plaintiff was nonsuited; but the nonsuit was afterwards set aside and a new trial granted, in order to give the plaintiff an opportunity, if he could, to supply the defect. He accordingly made a motion, founded upon an affidavit stating the facts, in the Superior Court of Robeson, at the Spring Term,

1840, before his Honor Judge BAILEY, that the clerk should affix the seal of the said court to the executions *nunc pro tunc*. The motion was resisted, and his Honor being of opinion that he had no power to make the amendment, overruled the motion. It was then placed on the record, and the plaintiff appealed.

No counsel appeared for either party in this court.

DANIEL, Judge, after stating the case as above, proceeded as follows: The case comes before us upon the single point, whether the Superior Court of Robeson county had the power, at the time the motion was made, to amend the executions by affix-
(35) ing the seal of the court to them. We are of the opinion that the court had the power. The omission of the clerk to affix the seal to the executions, was but a misprision in him. At common law, the court on motion will, while the pleadings are in paper, and before they are entered of record, permit amendments in form or substance, on proper and equitable terms. But when the proceedings are entered on record, the court will not amend further than is allowable by the statutes of amendments. In this State, as in England, judicial writs are seldom ever recorded, so that while they are but on the file, the common law rule as to amendments are as properly applicable to them as to the pleadings in a cause whilst they remained in paper. Bing. on Judgments, 72; Bing. on Execut's, 189. In England, writs of *ca. sa.* and *fi. fa.* must be signed as well as sealed. When third persons, who derive title from one of the parties, are not affected, executions may be amended by adding or altering the *teste* or return. Tidd., 986, 1027; 1 Marsh. Rep., 399; 5 East., 291; Bing. on Executions, 190. Such amendment was authorised to be made by a decision of this court, in *Smith* v. *Daniel*, 3 Murp., 128. And we think, with Judge HENDERSON, that an amendment is a matter of course, as to the affixing the seal to the executions, when they have been omitted by the negligence or ignorance of the clerk, and no third person claiming under one of the parties to the execution is affected thereby. *Seawell* v. *Bank of Cape Fear*, 3 Dev. Rep., 284. We know that executions may be amended after they have been acted on, so as to render them a justification to the officer, when otherwise they would not be. *Bender* v. *Askew*, 3 Dev. Rep., 151, and the authorities then cited. Then why not amend by affixing the seal to protect a *bona fide* purchaser? We think that the judgment must be reversed; and this opinion must be certified to the Superior Court of Robeson, with directions to proceed upon the motion according to its sound discretion.

PER CURIAM. 22 Judgment reversed.

(36) JACOB CARROLL, Adm'r of GEORGE REYNOLDS, *vs.* LEMUEL DURHAM et al.

1. If one of two or more obligors in a bond, administer upon the estate of the obligee, he cannot maintain an action on the bond against the other obligors; and though the action is only suspended during the life of the administrator, and may be brought by the administrator *de bonis non* of the intestate, yet the defence is properly upon a plea in bar, instead of a plea in abatement.
2. The distinction between the debtor's being the executor of the creditor, and his administrator stated, and the reasons of it explained.
3. The operation of the act of 1824 (1Rev. St., ch. 2, Sec. 6), which provides for the revival of a suit by an administrator, explained.
4. The bond of an obligor who is administrator or executor of his obligee, is assets in his hands as to the creditors and legatees, or next of kin of the obligee.
5. What relief a surety who administers upon the estate of his obligee may have against his principal obligor discussed.

This was an action of DEBT, on a bond, brought by Jacob Carroll as administrator of George Reynolds, deceased, against Lemuel Durham and Benjamin Durham. The bond was given by Jacob Carroll (the present plaintiff), and the two Durhams to Jesse Reynolds, by whom it was endorsed to George Reynolds, who died intestate. The plaintiff took administration of his estate, returned the bond in his inventory, and then brought this action. The defendants pleaded several pleas in bar; and amongst them, they specially pleaded the above facts. At the trial, on the last circuit at Rutherford, before his Honor Judge HALL, the facts appearing on the evidence to be true, the plaintiff was nonsuited, and appealed.

Iredell for the plaintiff.

No counsel appeared for the defendants in this court.

RUFFIN, Chief Justice, after stating the case as above, proceeded as follows: There is precise authority very ancient, and also modern, that this action would not lie, if the plaintiff were executor, instead of being administrator. In *Wankford* v. *Wankford*, 1 Salk, 299, Mr. Justice GOULD cites from the Year Book 21, Ed. 4, 81, a case where several persons were jointly and severally bound, and the obligee made one of the obligors his executor; and it was held that he could not have an action against the other obligor. Exactly the same point came under consideration in *Cheetham* v. *Ward*, 1 Bos. & Pul., 630, and was decided the same way. There was an effort to sustain the action, upon the distinction between a joint bond, and one joint and several; and upon the difference between a release by deed, and

one by operation of law. But the court thought there
(37) was nothing in the distinctions; for they said, there is,
in fact, but one duty extending to all the obligors, and a discharge of one, or a satisfaction made by one, is a discharge of the others. That was considered as putting an end to the argument, that the action is not necessarily suspended as to all the obligors: "for it is the effect," says Chief Justice EYRE, "of the suspension as to one, that releases, discharges and extinguishes the action as to both."

We are aware that there is a well settled difference between the cases of the debtor being the executor of the creditor or his administrator. When the obligor, or one of the obligors is executor, not only is an action on the debt suspended, but the debt is extinguished; and no action on it ever will arise. But the committing of administration to the obligor does not extinguish the debt. It suspends the action, but the debt remains. *Sir John Needham's* case, 8 Rep., 136. Both the executor and the administrator must, indeed, account for the debt, as assets to creditors and legatees, or next of kin. Cro. Car., 373; 1 Salk., 303 and 306; *Carey* v. *Goodinge*, 3 Bro., ch. cas., 110. But in neither case, can there be an action at law for the debt; from the absurdity of the same person being both plaintiff and defendant. But that is not the only reason of the rule as applicable to executors; for if it were, then should the executor die intestate, his administrator could be sued by the administrator *de bonis non cum testamento annexo* of the testator. Yet it is clear, that cannot be; for no action at law will ever lie for any person on the debt. Mr. Justice POWELL, in *Wankford* v. *Wankford*, states the true reason, that which is peculiarly applicable to the case of an obligor being appointed the obligee's executor. He says, "the reason is, that a personal action, once suspended by the act of the party, is gone forever; and though in some cases it may be suspended and revive again, yet, never where the suspension is by the act of the party." It is not, therefore, that the remedy is suspended, but that it is suspended by the testator's own act, that extinguishes the executor's debt. For in such a case, we may well say, as is said in the book, the debt is extinct; since a duty for which there is no remedy *in pre-*
(38) *senti vel futuro* ceases to be a duty in a legal sense. But
both Mr. Justice POWELL and Lord HOLT say, that an administration is but a suspension of the action, and not an extinguishment of the debt; because the administration is not the act of the party, but of the law; and for this they quote

Sir John Needham's case. What is meant by the action being suspended very plainly appears. It is, that there can be no action while the administration continues, because of the absurdity before mentioned. But that after it shall be no longer in force, either from its repeal, or from the death of the administrator, then an action will lie; because the debt has all along subsisted, and then there are proper parties to constitute the action, namely, the administrator *de bonis non* of the first intestate, and the executor or administrator of the first administrator. Accordingly, *Sir John Needham's case* was an action by an administrator against one who administered on the creditor's estate, but whose letters were repealed. It is true, in that case, the letters to the defendant were improperly granted, and were declared in the Spiritual Court *pro nulla* and *invalida ad omnem juris effectum.* But the judgment was not founded on that, but on the general principle, that although the action had been suspended, yet it then well laid for the administrator *de bonis non.* For in that case, Lord COKE cites, as analogous and illustrative of the rule, the case of a woman executrix marrying the debtor of her testator, and after the death of the husband, having her action against his executor or heir; because she held the debt in another right, and it was only suspended during the coverture. And in another case, cited in Bac. Abr. Executors A, 10, and reported in Siderfin, 79, and 1 Keb., 313, the obligor was appointed administrator and died; and then his executor was sued for the debt by the administrator *de bonis non* of the obligee, and the plaintiff had judgment. But it is undoubtedly the law, that during the life of the administrator and the existence of his administration, there can be no action on his debt to his intestate, if he be the sole debtor. And we think the law must be the same if the administrator be one obligor with others in a joint and several bond. The principle of *Cheetham* v. *Ward,*
(39) and the old cases cited in it, is that the contract creates but one duty, of which the obligation is the same upon all the obligors; and therefore, that whatever discharges that obligation as to one does so as to the others. Now, as far as this principle goes, the cases of an executor and administrator are strictly analogous; and therefore we think those adjudications, last quoted, direct authorities that the present action will not lie.

But a doubt has been suggested, whether the matter is properly in abatement or in bar. To make the principle, of which we have been speaking, self-consistent, it must be a part of it, that when there is a discharge of one of the debtors, the dis-

charge of the others is to the same extent with his, and no further. When one of the obligors is appointed executor of the obligee, the discharge of all, from both the action and the debt, is total and perpetual. But the discharge to an administrator in such a case, is not from the debt; but it is temporary from the action. Consequently, his co-obligors can claim no more through him. Now it is true, that if the right of action be merely suspended, or the matter pleaded only defeat the present proceeding, it should usually be pleaded in abatement. Some matters, indeed, may be pleaded either in abatement or in bar; and, perhaps, this may be of that character. But, without saying that it might or might not be pleaded in abatement, we think it good in bar, notwithstanding the defendants have but a temporary protection against the payment of the debt. The case is a peculiar one. The right of action is but suspended, as regards these defendants, but it is suspended until the death of the present plaintiff, and therefore, until a period so late that he cannot have an action on the bond at any time. Consequently, *he* is barred. The present administrator, who cannot sue, must not be confounded with the administrator *de bonis non*, who may sue when he comes into existence. They are different persons; and, at common law, there was no privity between them. It is still very limited, as created by statute. The act of 1824, 1 Rev. Stat., ch. 2, sec. 6, in one section gives a *scire facias* to an administrator *de bonis non*, on a judgment recovered by an executor or administrator.

(40) The first section enacts that no suit, to which an executor or administrator is a party, shall abate by his death, but may be revived by or against the administrator *de bonis non* of the deceased, as, by the existing law, it might be by or against an executor upon the death of his testator, the original plaintiff or defendant in an action. But it is the necessary construction of that act, that the administrator *de bonis non* may proceed only in such action by the first administrator, as that administrator could properly bring and maintain. It does not authorise the first administrator to bring a suit, which, otherwise, he could not. It does not enable the plaintiff to sue now, because at his death an action will arise to the administrator *de bonis non*. That, indeed, will be a different action from the present; for this is against two only of the obligors, while that will be against them and the executor of the present plaintiff. As therefore *this plaintiff* can *never* maintain an action on this bond, because he is one of the obligors, that matter must be a good plea in bar; and as the facts were undisputed at the trial, he was properly nonsuited.

We should have more hesitation in pronouncing this judgment, if the estate of the intestate lost by it, or even if his co-obligors were set free from the debt to the prejudice of the present plaintiff. As has been already said, the debt is assets to all purposes in the plaintiff's hands; and therefore the estate is secure. Nor can we doubt that a method may be devised to obtain justice from the defendants. Perhaps, this might be a proper case for a special administration on this particular debt to be granted to a third person, while the plaintiff would administer the other parts of the estate. But if that be not done, yet if the plaintiff should pay debts of his intestate to the value of this debt, or should pay it in the account between him and the next of kin, we should be much inclined, and, at present, see no reason why we should not hold, that such actual payment would enable the plaintiff, in an action in his own name, to get contribution or indemnity from his co-obligors. In *Wankford* v. *Wankford*, after stating that an administration by the debtor does not extinguish the debt, Lord HOLT delivers his opinion further, "that if the administrator, having no assets, pays a debt of the intestate, to the value of the bond, out of his own
(41) money, that will be a release, though he had not known it to be so adjudged." We understand this to mean, that in such a case, the administrator *de bonis non* could not recover from the representative of the first administrator, because there was actual payment, and that was a discharge of the debt. A doctrine so reasonable must, we should think, be law. If it be, then payment by this plaintiff in a like manner, would be a perfect and final discharge of both himself and the defendants from the debt and from the action of the administrator *de bonis non;* and ought to give him his action presently against his co-obligors for whatever they ought to pay, as between themselves: for example, if he be the surety for one or both of them.

PER CURIAM. Judgment affirmed.

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(42) THE STATE UPON THE RELATION OF HENRY GILES *vs.* JOHN H. HARDIE.

1. An adjudication of the County Court, that a particular person has been duly elected Sheriff of the County, and that he has the necessary qualification of a freehold of one hundred acres of land in fee simple, is not a judgment *in rem*, binding upon all the world, but can at most only conclude the parties contesting the election, and cannot, therefore, operate as an estoppel to an information in the nature of a *quo warranto* filed by the proper officer of the State against the Sheriff, alleging the want of such freehold qualification.

2. An information in the nature of a *quo warranto* brought to try the right to an office of franchise, though in form a criminal proceeding, is in the nature of a civil remedy, and is not therefore within the meaning of the 8th section of the Bill of Rights, which declares that "no freeman shall be put to answer any criminal charge but by indictment, presentment or impeachment."

3. The act of 1836 "concerning writs of *quo warranto* and *mandamus*," (1 Rev. Stat., ch. 97) is not confined to contests between different claimants to offices and franchises; but is intended to regulate the mode by which all usurpations of offices and franchises may be examined and determined in the courts of justice. Hence, an information in the nature of a *quo warranto* may, with leave of the court, be filed by the Attorney General or Solicitors for the State, in their respective circuits, against a sheriff, to enquire by what right he holds his office; and whether any person should be named as relator or not in such information, seems to be immaterial, as the information is that of the Attorney General or Solicitor of the State, and not of the relator.

4. Whether its appearing affirmatively that an information was filed with leave of the court be necessary or not, it will be sufficient if the proceedings of record show that it has the sanction of the court.

5. It is no objection to an information that the full title of the "Solicitor for the State" is not given, and that the term "Solicitor" only is used. But if it were an objection, it would be formal only, and could not avail the defendant on a demurrer to his plea.

At the March Term, 1839, of Rowan Superior Court, an information in the nature of a *quo warranto* was filed by James R. Dodge, Esq., the Solicitor for the State, in that circuit, giving the court to understand and be informed that John H. Hardie had used and exercised, and was then using and exercising the office of sheriff of said county without any warrant, and had usurped, and was then usurping the said office; and alleging espe-
(43) cially that at the time of the election of the said John as sheriff of said county, he was not possessed of a freehold of one hundred acres of land in fee simple, and praying the advice of the court, and due process of law against the said John, to answer by what right he claimed to hold said office. Thereupon, by order of court, process issued as prayed, returnable to the September Term following, when the said John appeared and pleaded to the said information, first, that he was duly elected sheriff of said county, on the 9th day of August, 1838, by a majority of the legal voters of said county; and that he was seized of a freehold of one hundred acres of land in fee, as required by law; and, secondly, that at the August Term, 1838, of the County Court of Rowan, being the term immediately following the election of the respondent as sheriff of said county, the qualifications of the respondent to hold said office were contested; and thereupon it was by the said court, a majority of the justices of the county being present, adjudged

that the respondent was seized of the freehold, and had all the other qualifications required by law of a sheriff; and thereupon he was permitted by the said court to take the oaths and execute the bonds required by law of a sheriff, and did take the oaths and execute the bonds accordingly. To this second plea the Solicitor, in behalf of the State, demurred generally, and the respondent having joined in demurrer, the same was argued at the March Term, 1840, of said court, before his Honor Judge SETTLE, when the demurrer was sustained, and the respondent, by leave of the court, appealed from that judgment to the Supreme Court.

Badger, for the defendant, contended that the whole proceeding ought to have been dismissed, because the defendant could not be called to answer the information:

1st. The act concerning writs of *Quo Warranto* and *Mandamus*, 1 Rev. Stat., ch. 97, though general in its terms, is not applicable to the office of sheriff.

2d. If the office of sheriff be embraced in the act, or must be construed to be within its provisions, then the proceeding, being a criminal one, is prohibited by the 8th section of the Bill of Rights, and the Legislature had no right to pass the
(44) act. That the proceeding is of a criminal nature, see 2 Hawk. Pl. Cro., ch. 26, sec. 16; 1 Tremain's Pleas, 253; 6 Wentworth, 28 et seg.; *Attorneg General* v. *Utica Insurance Company*, 3 John. Ch. Rep., 371.

3d. The information is fatally defective, because it does not shew upon its face that it was filed by leave of the court. An information in England does not shew this; but there is a reason for a difference there and here. There, the power to file an information is not given by statute, but is only regulated by it; but, in this State, the power is given by the statute, and none exists in the Solicitor without it.

4th. The information is totally defective in form and substance. See 6 Wentworth's Pleas, 28, for a proper form.

5th. The Judge erred in saying that the pleas could not be sustained, although the County Court had decided the question. See the act concerning sheriffs, 1 Rev. Stat., ch. 109, secs. 5, 6, 7, 8. And if the question could be reviewed in any other court, the plea must be answered by shewing some special matter, and not by a general demurrer.

The Attorney General and *Barringer*, for the State, contended that the act applied to every office. Writs of *Quo Warranto* and *Mandamus* were writs known to the common law; and the statute of 9th Anne, and 4 and 5 Will: and Mary, only regulated

them. Our act embraces the office of sheriff in its terms. See Bac. Abr. Tit. Information, letter D.; Bul. N. P., 210, 211, 212; *People* v. *Van Slike*, 4 Cowen's Rep, 297.

2d. The argument that the act is unconstitutional is based upon the supposition that the proceeding is a criminal one; but it has always been regarded as a civil proceeding, though in some measure in the nature of a criminal one. 4 Cowen's Rep., 100; note A in *People* v. *Richardson; People* v. *Clerk*, 4 Cow. Rep., 95; 15 John. Rep., 387.

3d. To the objection that the information does not shew that it was filed by leave of the court, the reply is, that it was unnecessary; and if it were, the court's entertaining and acting upon it, shows that it had its sanction.

(45) 4th. As to the informality of the proceeding, the defendant is too late to avail himself of it after plea. 4 Term Rep., 276; Com. Dig. Tit. *Quo Warranto;* 3 Term Rep., 596, 599, note A. If an information be informal, the proper motion is to *quash* it; but after plea, it cannot be *quashed*. 4 Bur. Rep., 2297. The defendant had no right to plead double. 7 Eng. Com. Law Rep., 254.

5th. The fifth objection is, that the County Court has conclusively decided the question. To this it is answered, that the act concerning sheriffs applies only to cases of contested elections. The Superior Courts have a general right to review the decision of the County Courts. The act does not give the County Courts an exclusive jurisdiction, but only declares them to be competent tribunals to decide questions of contested elections.

GASTON, Judge, after stating the case as above, proceeded: The act in relation to appeals, enacts that when an appeal shall be allowed from an interlocutory judgment, the Judge allowing the appeal shall and may direct so much only of the records and proceedings in the cause to be certified to the Supreme Court as he shall think necessary to present the question or matter arising upon such appeal fully to be considered by the said court. No such direction has been given in this case, and we have no means of ascertaining the question or matter referred to us, further than that it arises on an appeal from the judgment overruling the respondent's second plea, and sustaining the demurrer thereto. The *direct* question, therefore, presented for our consideration is, the sufficiency of that plea. However *informal* this may be, it is in *substance* a plea by way of estoppel, that the State is concluded to allege that the respondent was not seized of a freehold

of 100 acres in fee, at the time of his election, because that matter hath been determined by the adjudication of the County Court of Rowan.

Waiving all formal objections to this plea, it is bad in substance. Judgments operate by way of estoppel against all the world, when they are judgments *in rem*—that is to say,
(46) pronounced by a court exercising that peculiar jurisdiction which authorises it to decide on a *subject matter* independently of *parties*. And they operate as estoppels between parties, to prevent further litigation in relation to a subject matter which has been directly and solemnly decided in a suit properly constituted between them. Now, in regard to the alleged adjudication of the County Court of Rowan, upon what ground can it be alleged to be a judgment *in rem*, binding all the world? There ought to be a very unequivocal grant of this *high* power to *that* court, before it can be assumed. Where is the evidence of this grant found? In the statute regulating the election of sheriffs, after prescribing by whom they shall be chosen, when and where the votes shall be received, how and where the returns of the votes received shall be made to the County Courts, it is declared, "and the County Courts, a majority of the Justices being present, shall be a competent tribunal to decide all contested elections under this act." Here is the whole of their authority to *decide* "contested elections." Between whom is such decision to be made? Manifestly between the *parties contesting*. It is an adjudication as far as it goes *inter partes*, and is therefore binding on none except the parties, or those who come in by privity under them. But it has been argued that the right of the matter in contest, may involve the necessity of determining on the qualifications of the person apparently elected, because, if he have not the necessary qualifications, the votes cast on him are thrown away. Without stopping to enquire whether this doctrine, the same which was so much agitated in Wilkes's case, be in any respect true with us, and, if so, to what extent, it is a sufficient answer to the argument inferred from it, that whatever the adjudication be—or on whatever founded—it decides nothing, except between the parties to the suit or contest. Public policy may require of parties who have once had a full and fair opportunity of asserting their respective claims before a competent tribunal, and who have obtained a soleman decision thereon, and of the representatives of those parties, not to agitate the repose of society by further litigation upon the same subject matter;

but it would violate the first principles of justice, if any
(47) one not a party to that contest, and who could not interfere therein, should be precluded from shewing forth his rights because of any matter therein determined.

It is insisted, nevertheless, on the part of the appellant, that if the plea in question be bad in substance, nevertheless the judgment on the demurrer is erroneous, because the information is altogether illegal, or if legal, is wholly insufficient. It may be doubted whether these grave enquiries are fit to be considered *now*, when the question before us is on the interlocutory judgment overruling the plea. But as they have been argued on both sides, and been fully considered, and as our minds are quite made up upon them, we have no hesitation in declaring our opinion.

It is objected, in the first place, that an information of the kind before us, is utterly prohibited by the 8th section of our Bill of Rights, which declares that "no freeman shall be put to answer any criminal charge but by indictment, presentment or impeachment." The enquiry is, whether the information in question be, within the meaning of the Bill of Rights, a "criminal charge?" In every well regulated government there must be some mode by which to put down the usurpation by unauthorised individuals of public power. In the country of our ancestors, and in ancient times, when any of the offices or franchises appertaining to sovereignty, and therefore called royal, were supposed to be held or exercised without lawful authority, the remedy was by suing out the writ of *Quo Warranto*, to enquire by what warrant the supposed usurper supported his claim, in order to determine the right thereto. This was said to be in the nature of a writ of right for the King, and from what we have seen of the pleadings in it, bore little or no resemblance to a criminal prosecution. See Rastell's entries *Quo Warranto*. Indeed Mr. Justice WILMOT, in *Rex* v. *Marsden*, 3 Bur., 1817, declares positively that it is not a criminal prosecution, but a civil writ at the suit of the crown, though Chancellor KENT, in the *People* v. *Utica Insurance Co.*, 2 Johns. cases in Ch'y, 117, speaks of it as a criminal proceeding. Be this as it may, the remedy certainly much resembled, if in truth it were not a
real action; and, like other actions of that family,
(48) was subjected in its prosecution to inconvenient delays.

On this account, like most real actions, in process of time it became much disused, and its place was supplied by the information in the nature of a *Quo Warranto*. Originally *this*

was a criminal proceeding. In it the usurpation was charged as an offence, and the offender, upon conviction, was liable to be punished by fine and imprisonment. Such, however, were the conveniences attending the information, as a mode of trying the mere question of right to the office or franchise, that although it never entirely lost its form as a criminal proceeding, it was so modelled as to become substantially a civil action. A fine, indeed, was imposed upon conviction; but it was nominal only—no real *punishment* was inflicted—and it became, before our revolution, the general civil remedy for asserting and trying the right, in order to seize the office or franchise, or to oust the wrongful possessor. See 3 Blk. Com., 262–3; *Rex* v. *Francis*, 2 Term, 484; *Commonwealth* v. *Brown*, 1 Serg. & Raw., 385; *People* v. *Utica Insurance Co.*, 15 Johns., 386.

Besides this peculiar information, well known as "the information in nature of a *Quo Warranto*," there was a mode of prosecution for the punishment of crimes by "information." This was, by a suggestion or charge, drawn up in form, and filed on record by the King's Attorney General, or by his Coroner or Master of the Crown Office, in the Court of King's Bench; and was deemed sufficient in every case not capital, to call every man to answer for the offence therein charged. There could be no doubt but this mode of criminal prosecution was as ancient as the common law itself, but the tyrannous use made of it in high prerogative times, especially after jurisdiction of criminal prosecutions by information was extended to other tribunals than the Court of King's Bench, justly subjected it to the reprobation of the friends to freedom. The framers of our Bill of Rights were not school men dealing in metaphysical abstractions, and busied about technical forms, but practical statesmen guarding against real abuses of power, and securing the substantial rights of freemen. They intended to prohibit this mode of prosecution for crimes, and to throw around the
(49) object of penal visitation the protection either of a grand jury, or of an enquiry by the impeaching body—before he could be required to plead to a criminal accusation. Such is the purpose of the 8th section of the Bill of Rights; and accordingly, we find it connected with a number of provisions from the 7th to the 10th inclusively, in which are embodied the securities for a fair hearing, full defence, impartial trial, and the administration of justice in mercy to all sought to be convicted and punished because of public offences. The proceeding before us is carried on *diverso intuitu*, and to hold it prohibited by the

Bill of Rights, would be to sacrifice substance to mere form. If, indeed, it should ever be attempted in informations of this character to impose a real fine, or to inflict any other punishment, so as to make them in effect criminal prosecutions, such attempts would fall before the explicit prohibitions of the section of the Bill of Rights now needlessly invoked.

In the next place, it is objected that the present information purports to be framed in conformity to the provisions of our act of 1836, "concerning writs of *Quo Warranto* and *Mandamus*," (1 Rev. Stat., ch. 97;) but on a fair examination of that act, it will be found not to warrant this proceeding. It is admitted that the *words* of the act are sufficiently broad to take in the case, for they declare it lawful for the Attorney General or Solicitors of the State, where any person shall hold or execute any office or franchise unlawfully, to exhibit, with the leave of the court, an information in the nature of a *Quo Warranto*, at the relation of any person desiring to prosecute the same. But it is argued, these words must be taken with some qualification. The act has been modelled after the English Statute of 9th Anne, which, in terms, is confined to informations respecting the disputed offices and franchises of boroughs and corporations; and although this act cannot be so restricted, yet (it is said) many of its provisions shew that the Legislature had in view contests between different claimants to offices and franchises, and its enactments ought to be understood with reference to contests of this description only.

(50) Here, it is not shewn what interest or claim the relator, Henry Giles, had in or to the subject matter of this controversy, and it cannot be intended that the Legislature meant that he, or any other officious stranger, might, under the cover of this act, and in the guise of a relator, call on any officer of the State, Governor, Judge or Sheriff, to shew the warrant for his public acts, in order to spy out, if possible, some defect of title.

We have before had occasion to say (see *State* v. *King*, decided at this term) that there are *some* provisions in this act as to proceedings by *mandamus*, which must be regarded as applicable only to contests between individuals. But we cannot yield to the argument that the enactments of the statute were not meant to apply to any other. The purpose of the Legislature, we have no doubt, was as broad and comprehensive as the terms of the act indicate: that is to say, to regulate the mode by which all usurpations of offices and franchises might be examined and determined in the Courts of Justice, "as is usual in cases of

information in the nature of a *Quo Warranto.*" Such informations lay, at common law, independently of any statute, for intrusion into any office affecting the public, or for the exercise of a franchise of what was termed a regal character. Buller's Nisi Prius, 211; *The King* v. *Highmore*, 5 Barn. & Ald., 771; Com's *Quo Warranto*, A. B. The object of the statute of Anne was to regulate the proceedings thereon in certain cases relating to corporations, and our Legislature followed that statute as a fit model for regulating the proceedings on informations *generally*. There can be no serious danger, that, under our act, the public repose will be capriciously disturbed, since no information under it will lie, but with leave of the court, and then must be prosecuted by the proper law officer of the State upon his official responsibility. Whether in this case, it was necessary that any relator should be named, we stop not to enquire. For whether he be named or not, the information is that of the Solicitor of the State; and we hold it to be clear, that under our act "concerning the Attorney General and Solicitors for the State," each Solicitor, within his respective circuit, holds in all pleas of the State the same authority which the Attorney General may exercise therein, within *his* circuit. There is nothing in the
(51) nature of the office here claimed, which should exempt usurpations of it from the mode of legal examination and trial provided by this act. See *People* v. *Van Slick*, 4 Cow., 323; *Commonwealth* v. *Fowler*, 10 Mass., 295.

Other objections have been made to the mode of proceeding, but they do not appear to us well founded. It has been objected that it does not appear that this information was filed by leave of the court. Without admitting that it is necessary that this fact should appear *affirmatively*, we hold, that in this case, the explicit sanction by the court of the information of the Solicitor, as declared of record, shews that it was filed with the leave of the court.

It has also been objected that the full title of the "Solicitor *for the State*" is not set forth in the information, but he is termed "Solicitor" only. The court knows, judicially, who is the Solicitor for the State in that circuit; and we presume it had no difficulty, and we can have none, in understanding that it was in *this* official character the information was filed. If there be anything in the objection, it is formal only, and cannot avail the respondent on a demurrer to his plea.

We see no sufficient cause to disapprove the judgment from which the respondent has appealed to this court. This opinion

must be certified to the Superior Court of Rowan, that the said court may proceed in the matter before it accordingly.

PER CURIAM. Judgment affirmed.

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(52) ASIA WHITE *vs.* JOHN C. PETTIJOHN et al.

1. The condition of a bond given upon obtaining a writ of sequestration on a Judge's fiat, in a suit in equity, that the plaintiff "shall prosecute his said suit with effect, or in case he fails therein, shall well and truly indemnify the defendant for all damages which he may sustain by reason of the filing of said bill, and the suing out of said writs, and shall further do and receive what the said court shall consider in that behalf," is not broken by any thing short of the abandonment of his suit by the plaintiff, or his defeat therein. Hence a decretal order, in the progress of the cause, that the sequestration be removed and the sequestered property restored to the possession of the defendant, and that he have leave to put the bond in suit, but without finally deciding the matters in contestation between the parties, will not authorise a recovery upon the bond for a breach of its conditions.
2. The distinction between a bond given upon obtaining a writ of sequestration under a Judge's fiat and an ordinary injunction bond given upon getting an injunction to stay a judgment at law stated.

In April, 1839, William White and John C. Pettijohn filed their bill of complaint against Asia White, wherein they claimed to have an interest in remainder in certain slaves that were in the possession of the said Asia White, and of which they alleged that she was tenant during her life; and by the said bill they prayed that she should answer the allegations thereof on oath; that a writ of injunction or *ne exeat* might issue to restrain the said Asia from selling, removing, or in any way disposing of the said slaves, so as to defeat the interests of the complainants; that she should be bound in such sum as the court should judge right for the performance of said injunction, as well as such other order and decree as might be made in the premises; and for such other and further relief in the premises, by sequestration or otherwise, as should be deemed right and equitable. Upon an affidavit by the complainants, that the matters of fact set forth in their bill were true, they obtained a Judge's fiat directing the Clerk and Master of the Court of Equity for the county of Washington, upon the complainants' giving bond and security in the penal sum of one thousand dollars to indemnify the defendant, to issue a writ of *ne exeat* to restrain the defendant from carrying the slaves mentioned in the bill out of the State; and also an order to the sheriff to take the slaves and hire them out until the next term of the Court of Equity for

that county, unless the defendant should enter into
(53) bond and security, in the sum of three thousand dollars,
to have the said slaves at the said term of the said court, to abide the order and disposition thereof. Thereupon the defendants executed the bond, which is the subject matter of the present action. The condition of this instrument recited the filing by White and Pettijohn of their bill of complaint, and the fiat made thereon by the Judge, and then proceeded as follows: "Now, therefore, if the said White and Pettijohn shall prosecute their said suit with effect, or in case they fail therein, if they shall well and truly indemnify the said Asia White for all damages which she may sustain by reason of the filing of said bill, and the suing out of the said writs, and shall further do and receive what the said court shall consider in that behalf, then the above obligation to be void." A writ thereupon issued returnable to the September Term of said Court, directed to the sheriff, and commanding him, unless the defendant in the suit in equity, Asia White, should give bond and surety for the forthcoming of the slaves aforesaid, at that term, to be disposed of as the court should order, to take the same into his possession, and hire them out until the said term, and so to provide as then and there to have the same forthcoming to answer such order, judgment or decree as the court might make. In obedience to this writ, the sheriff took the slaves into his possession, and hired them out until the next court, and took bonds for their forthcoming to await the order thereof. A writ also issued directed to the said Asia, enjoining her not to send the slaves out of the State, and also a writ of subpœna, with a copy of the bill, commanding her to make answer to the facts therein charged. She accordingly put in an answer at September Term, 1839, to the bill of the complainants, and it appeared that then a decretal order was made as follows: "By the court, this cause coming on to be heard upon the bill of complaint and the answer thereto, it is ordered, adjudged and decreed that the sequestration be removed; that the sheriff return the negroes to the defendant; that he pay over to her either the money or the bonds for the hire of them; that the defendant be enjoined from selling or removing the
negroes out of the jurisdiction of this court; that the
(54) complainants have leave to file an amended bill, and to
make parties; that the defendant have leave to answer the amended bill, and to put the injunction bond in suit; and that the costs of this suit await the decision thereof." Thereupon the plaintiff brought this action, and assigned for a breach of the condition

that the said White and Pettijohn had failed in the prosecution of their said suit, and did not indemnify her against certain damages which she had sustained thereby. Upon the trial at Washington, on the last circuit, before his Honor Judge PEARSON, the only question was, whether the said White and Pettijohn had failed to prosecute their suit within the meaning of the condition of the bond. Under the instructions of his Honor, the jury returned a verdict for the plaintiff, and the defendants appealed.

M. Haughton for the defendants.
J. H. Bryan for the plaintiff.

GASTON, Judge, after stating the facts as above, proceeded as follows: We are of opinion that the facts shewn do not make out such a failure, upon the ground that from them it appears that the suit is undecided, and victory or defeat, success or failure, remains to be ascertained by the result of that suit.

It may not be easy for a court of law to pronounce upon the effect of the decretal order that was made in the equity suit; but it cannot fail to see that that order does not determine, nor profess to determine the controversy between the parties. It makes, indeed, a different arrangement for the custody of the slaves than that which was temporarily directed upon the filing of the bill, and which had expired by its own limitation. But for some purpose or other, it continues and upholds the injunction, which had issued to restrain the defendant from carrying the negroes out of the State, and concludes with authorising the plaintiffs and the defendant to amend their respective allegations. Which of the parties gets the advantage in this, their first encounter, it is unnecessary to enquire. It is enough for the purposes of this suit, that the contest is not ended.

(55) Failure, used in connection with any enterprise, in its ordinary and obvious sense, means abandonment or defeat. There may be checks—there may be disappointments—there may be auguries of ill omen—but so long as the enterprise is prosecuted and its result unascertained, there is no *failure*. That the term failure, in the bond before us, was used in this, its ordinary sense, is rendered more probable by the manifest resemblance between this bond and the prosecution bond given by plaintiffs in suits at law. The clerk of every court of law is required, before he issues any writ or leading process, to take sufficient security from the person so applying, "conditioned that he will prosecute such suit, and, in case of failure,

pay to the defendant all such costs and damages as may be awarded against him." What is meant in a bond taken under this act, by "prosecution of the suit"—and by "failure" therein—is beyond doubt. They mean, on the one hand, a successful prosecution unto final judgment—and on the other, a voluntary abandonment of the suit, or a final judgment against the plaintiff. Now, what good reason can be assigned why the same terms used in the condition of the bond before us—so strikingly alike the ordinary bond given by every plaintiff on instituting a suit at law—should receive a different meaning? The error into which the court below has fallen, was probably occasioned by regarding the bond as an injunction bond, and thence inferring that the condition thereof ought to be interpreted by analogy to that which prevails in *ordinary* injunction bonds. But it is to be noticed, that the condition of *these*, that is to say, wherever an injunction issues to stay execution of a judgment at law, is positively prescribed by statute: "the complainant shall enter into bond with sufficient security before the Master of the Court of Equity, whence the injunction issues, for the payment into court of the sum complained of, and all costs, *upon the dissolution of the injunction.*" The specific contingency upon which the entire obligation rests, is the dissolution of that injunction. If it be dissolved, the bond *necessarily* becomes absolute. But no statute prescribes the form in which any other injunction bond shall be given. Upon the sound discretion of the Judge, who makes a fiat for such injunction, depends
(56) the security to be demanded from the applicant. And upon the *terms* of that security depends the liability of him or them who enter into it.

The order of the Court of Equity that the plaintiff have leave to put the bond in suit, has no other effect than to save her from the penalties of a contempt, for bringing an action thereon without permission. It cannot modify the character of the instrument.

It is the opinion of this court, that the judgment below is erroneous, and ought to be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

SEABURY TREDWELL et al. *vs.* BURWELL REDDICK.

1. The entering upon, ditching and making roads in a cypress swamp for the purpose of getting shingles therein, and cutting down the timber trees and making shingles out of them, is, in law, a possession of the swamp.

2 The constructive possession of land arising from title, cannot be extended to that part of it, whereof there is an actual adverse possession, whether with or without a paper title.

3. The action of trespass cannot be maintained without possession.

This was an action of TRESPASS QUARE CLAUSUM FREGIT for cutting timber in a cypress swamp, tried at Washington, on the last circuit, before his Honor Judge PEARSON.

The plaintiffs read two grants to Charles Johnston; one dated 1796, for 5,000 acres; and the other dated 1797, for 8,000 acres, and then offered much testimony to shew that these two grants included the *locus in quo*. The plaintiffs then produced regular mesne conveyances from Johnston to themselves—the deed to themselves bearing date in 1835. It was then proved by the plaintiffs, that in 1834, before the execution of the deed to them, they entered into the swamp and took actual possession of a part, claiming the whole, and were in possession getting out
(57) shingles at the date of the writ, in 1836; and that they had continued in possession all the time from 1834, before the date of their deed, up to the time when the writ was issued. They further proved that in 1833 the defendants had entered into the swamp, cut several ditches, made roads, and had commenced cutting down, and making shingles out of, the timber trees rendered accessible by means of these ditches and roads, and continued to make shingles out of the timber thus situated from 1833 up the issuing of the writ. It was also in proof that in 1833 the defendants had erected tents on the land convenient to their roads, for the accommodation of their hands and mules; and had kept the hands, mules and carts at work in the swamp from 1833 to the date of the writ. It was proved further that the swamp was not fit for the purposes of cultivation, and could not be inhabited, and could only be used in the manner in which the defendants used it, for getting shingles by the means above stated. It was proved further that the place where the plaintiffs got out shingles was a mile and a half from the place where the defendant got them.

At this stage of the trial, the court suggested to the plaintiffs' counsel that there seemed to be two objections to a recovery: 1st. The defendant's being in the actual occupation of the *locus in quo* at the date of the plaintiffs' deed. 2ndly. The defendant's continuing in the actual occupation of the *locus in quo* from 1833, before the date of the plaintiffs' deed, up to the time of the issuing of the writ without an entry. The counsel replied to the first objection, that the defendant had not been in the actual

occupation of the *locus in quo*, but must be considered as having committed so many distinct small trespasses, by going upon one spot and staying there until he could cut down a tree and make it into shingles, and then abandoning that spot and going to another; and further, that his possession, supposing it were considered a possession, was not adverse, for he had shown no sort of title. To the second objection the reply was, that in addition to the idea that the defendant had no occupation, but was simply guilty of so many distinct trespasses, the plaintiffs having
(58) shewn a title, and having taken actual possession of a part, were in law considered in the possession of the whole tract covered by their title.

The court expressed the opinion that the proof made out a case of occupation, and not simply several distinct trespasses, as to all the land and timber trees made accessible by their ditches and roads; inasmuch as that was the only way in which the swamp could be used or occupied: and secondly, that a possession of a part under title gave possession of the whole, unless a part was actually occupied by another person, in which case the possession did not extend by force of the title to the part so held in actual adverse possession, whether the occupant had or had not a paper title; and that it was necessary for the plaintiffs to obtain possession of the part occupied by the defendant by means of an ejectment, or otherwise, before an action of trespass could be maintained.

The plaintiffs, in submission to this opinion of the court, were nonsuited and appealed.

M. Haughton for the plaintiffs.
A. Moore for the defendant.

GASTON, Judge. The opinion expressed by his Honor, on the trial of this cause, seems to us entirely correct. Upon the evidence, it cannot be questioned, we think, but that the defendant was in actual possession of the *locus in quo* before, at and after the date of the plaintiffs' deed, down to the institution of this action. It was a possession as decided and notorious as the nature of the land would permit—affording unequivocal indication to all persons that he was exercising thereon the dominion of owner. *Den on dem. Burton* v. *Caruth*, 1 Dev. & Bat., 2; *Simpson* v. *Blount*, 3rd Dev., 34. The *actual* occupation of the plaintiffs has never approached within less than a mile and a half of the part of the swamp thus held by the defendant. The *constructive* possession, arising from title, cannot be extended to

that part whereof there is an actual opposing possession, whether with or without a paper title. *Graham* v. *Houston*, 4 Dev., 232. And, without possession, the action of trespass cannot be maintained. The judgment of nonsuit is affirmed.

PER CURIAM. Judgment affirmed.

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(59) THE STATE *vs.* ELIZABETH BUCHANAN et al.

After a motion to quash an indictment containing two counts, one of which is defective, the officer prosecuting for the State may enter a *nolle prosequi* as to the defective count, which will remove the grounds for the motion to quash, and leave the defendant to be tried upon the charge contained in the good count.

The defendants were charged in an indictment containing two counts. In the first count, they were alleged to have feloniously taken and carried away a bar of iron, of the value of fifty cents; and in the second, to have feloniously and unlawfully received of a person, to the jurors unknown, a bar of iron of the value of fifty cents, well knowing the said bar of iron to have been feloniously stolen, contrary *to the Statute*, &c. After pleading not guilty, the defendants, at Cabarrus, on the last Fall circuit, before his Honor Judge DICK, moved to quash the indictment. Before the motion was decided on by the court, the Solicitor for the State entered a *nolle prosequi* as to the second count in the indictment; but the court, notwithstanding, quashed the indictment, and the Solicitor thereupon appealed.

The Attorney General for the State.
Barringer for the defendants.

DANIEL, Judge, after stating the case as above, proceeded as follows: In the case of the *State* v. *Thompson*, 3 Hawks, 613, this court decided that the Attorney General has a discretionary power to enter a *nolle prosequi*, for the proper exercise of which he is responsible. The court never has interfered with the exercise of this power, though they certainly would do so if it were oppressively used. In the case of the *Commonwealth* v. *Wheeler*, 2 Mass. Rep., 172, PARSONS, Chief Justice, said that the power of entering a *nolle prosequi* is to be exercised at the discretion of the Attorney General, who prosecutes for the Government, and for its exercise he alone is responsible. Lord HOLT to the same effect; 6 Mod. Rep., 262. If the Attorney General can enter a *nolle prosequi* to the whole indictment, he, in analogy to the

practice in civil proceedings, must have the power to
(60) enter it to any count in the indictment; for each count should charge the defendants, as if they had committed a distinct offence. 1 Chitty's Crim. Law, 249, 479. The defendants having been discharged by the *nolle prosequi* from observing their day in court, on the second count, they then stood charged on the first count only; which is a good and sufficient indictment for larceny, and there was no ground for the court to quash. We think the judgment must be reversed, and the defendants directed to be put upon their trial.

PER CURIAM. Judgment reversed.

JAMES C. STEPHENS *vs.* REUBIN B. BATCHELOR et al.

Where an action is brought in the County Court, against two defendants, who plead severally, and a verdict and judgment are rendered in favour of one, and against the other defendant, the latter may alone appeal from the judgment rendered against him.

The plaintiff brought an action on the CASE, in the County Court of Nash, against the defendant, Reubin B. Batchelor, and three others, for aiding and assisting in the removal of a debtor of the plaintiff from the county. The defendants appeared and pleaded severally the general issue, and upon the trial, a verdict and judgment were rendered in favor of the plaintiff, against two of the defendants, and against the plaintiff as to the other two defendants; whereupon the defendants, against whom the verdict and judgment were given, appealed to the Superior Court; in which, on the last circuit, before his Honor Judge NASH, a motion was made to dismiss the appeal, upon the ground that a part only of the defendants had taken it. The motion to dismiss was overruled, and the plaintiff appealed to the Supreme Court.

B. F. Moore and *Battle*, for the plaintiff, insisted that, as in an action against two or more, if a verdict be rendered against
one defendant, and in favor of the others, the defend-
(61) ant complaining of the verdict, cannot have it set aside so far as it is against him only and a new trial awarded, he ought not to be permitted to obtain a trial *de novo* for himself, by means of an appeal to a Superior Court. They also referred to the cases of *Hicks* v. *Gilliam*, 4 Dev. Rep., 217, and *Dunn & McIlwaine* v. *Jones*, 4 Dev. & Bat. Rep., 154.

The Attorney General, for the defendants, submitted the case without argument.

GASTON, Judge. We think the Superior Court properly refused the plaintiff's motion. The point presented by it must be regarded as one quite settled by previous adjudications. In the case of *Sharp* v. *Jones*, 3 Murph. Rep., 306, where an action had been brought against several defendants, and the plaintiff obtained a judgment against one only, it was held that *he* had a right to appeal. This case has been repeatedly noticed in subsequent adjudications, and always recognized as laying down the true doctrine. See *Hicks* v. *Gilliam*, 4 Dev. Rep., 217; *Dunn & McIlwaine* v. *Jones*, 4 Dev. & Bat. Rep., 154. That doctrine is, that where there is a joint judgment, the appeal must be prayed by all against whom it is rendered—but where there are several judgments, or a judgment several in its parts, he may appeal alone who is alone aggrieved thereby. It has been said that this ought not to be. It is argued that when, in an action against two, a verdict is rendered against one defendant, and in favour of the others, the defendant complaining of the verdict cannot have it set aside so far as it is against him only, and a new trial awarded, and that, according to this analogy, he ought not to be permitted to obtain a trial *de novo* for himself, by means of an appeal to a Superior Court. Now, it is to be remarked that the rule of practice referred to, has been felt and acknowledged to be sometimes an inconvenience; and, on that account, where justice seemed strongly to protest against it, as in criminal prosecutions, it has been openly disregarded. See *The King* v. *Mawby and others*, 6 Term Rep., 619. Besides, an appeal, for the purpose of a trial *de novo* of the issues, is itself an entire departure from common law principles; and there is no
(62) reason why, in making this departure, the analogy of the common law usages should be any further observed than the purposes of justice require. It has been objected, too, that the rule, whatever it may be, ought to be mutual—that in the cases put, the plaintiff cannot appeal solely from the judgment rendered in favour of one of the defendants, and therefore a defendant should not be allowed to appeal from the judgment rendered against him. But, there is no foundation for this complaint of a want of mutuality. Each party is allowed to appeal; and the appeal must be from the whole judgment, so far as the appellant is interested. The convicted defendant is a stranger to every part of the judgment, except that which is rendered against him, whereas the plaintiff is a party to the whole judgment, with respect to all and every of the defendants. The distinction is precisely the same which prevails in the prosecution

of writs of error. The plaintiff in the original action suing out a writ of error, must pray the reversal of the entire judgment. But where in an action one defendant has judgment, and the plaintiff recovers against the other, the latter may alone bring error to reverse the judgment rendered against himself. *Cannon* v. *Abbot*, 1 Lev., 210; *Oliver* v. *Hanning*, 1 L'd Raym., 691; *Vaughn* v. *Lariman*, Cro. James, 138.

PER CURIAM. Judgment affirmed.

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(63) JORDAN GATLING *vs.* ASA D. LIVERMAN.

No appeal can be taken by one who has procured himself to be made a party defendant, from an order of the County Court, confirming the report of the justice and freeholders under the act of 1834, ch. 22 (1 Rev. Stat., ch. 104, sec. 7), which provides for turning a public road on the applicant's own land.

This was a proceeding by the plaintiff under the act of 1834, ch. 22 (1 Rev. Stat., ch. 104, sec. 7), to turn a public road on his own land. The report of the justice and freeholders was duly returned to the County Court of Hertford, and Asa D. Liverman was, upon his application, made a party defendant, whereupon the court, after hearing the cause upon the said report and the evidence produced by the parties, ordered the report to be confirmed, and the defendant appealed to the Superior Court, where a motion was made by the plaintiff's counsel, on the last circuit, before his Honor Judge PEARSON, to dismiss the appeal. This motion was refused, and his Honor proceeded to hear the cause, and thereupon refused to confirm the report, but ordered the proceeding to be dismissed, and the plaintiff appealed to the Supreme Court.

A. Moore submitted the case without argument.

Iredell, for the defendant, referred to, and commented upon, 1 Rev. Stat., ch. 104, sec. 7, and ch. 4, sec. 2, and the cases of *Hawkins* v. *County of Randolph*, 1 Murph. Rep., 118; *Wood* v. *Hood*, 1 Car. Law Repos., 513, and *Ladd* v. *Hairston*, 1 Dev. Rep., 368.

RUFFIN, Chief Justice. There is but one point in the case proper for the consideration of this court. That is on the motion of Gatling to dismiss the appeal, because no appeal lies in such a case. On that question, our opinion differs from that of the Judge of the Superior Court, and is, that the appeal ought to have been dismissed.

Before the act of 1813 (1 Rev. Stat., ch. 104, sec. 2 & 3), there was no appeal from an order of the County Court, refusing or ordering the laying out a public road. *Hawkins* v. *Randolph*, 1 Murph. Rep., 118. That act prescribes the
(64) method in future, for opening, turning or discontinuing a road, and enacts, that it shall be only on petition in writing; and from the decision thereon, gives an appeal to any person dissatisfied therewith. To the end that the citizens generally may have an opportunity of opposing the prayer of the petition before the court, and of appealing, notice of the proceeding is to be given in a particular manner. Afterwards came the act of 1834, ch. 22 (1 Rev. Stat., ch. 104, sec. 7), to provide for the special case of an application by one to turn or alter a road altogether on his own land. It is unnecessary to enumerate all its provisions, since it is only material at present to observe that it is plain it was intended to dispense with the written petition, and with notice of the application to court, or other notice to any person, except only to the overseer, as to the time and place of the meeting of the justice of the peace and freeholders; and to observe further, that there is no provision in the act for an appeal. The fair construction of this statute, from the nature of the subject, and from the silence of the law upon the point, is, that it was not intended to allow an appeal. As the power of the court, under the act, is limited to a case in which the road is wholly on the land of the person who applies respecting it, the Legislature takes the case entirely out of the operation of the act of 1813; and therefore, as we suppose, did not give an appeal. It would seem that no other individual was considered as having a private interest in the question; and that the County Court was regarded as possessing competent knowledge of the localities, and as affording a sufficient and safe protection to the interests of the public. This construction is further confirmed to our minds by the manner in which the enactments stand in the Revised Statute, ch. 104. By the sections 2 & 3, the act of 1813, with its provision for an appeal, is re enacted. In section 7, the act of 1834 is incorporated; having no provision for an appeal. Then in sections 33, 36 and 38, we have the enactments respecting cart and wagon ways, and respecting the erection of gates across a public road; and in each of those cases an appeal is expressly given. When we thus find,
(65) that in three instances the Legislature has, in this single act, explicitly provided for an appeal, and in a fourth case, of which the circumstances are peculiar, has made

no such provision, the inference forces itself on us, that it was intended in this last case, that there should not be an appeal.

Thus the question stands on the "act concerning roads." We think the "act concerning appeals," 1 Rev St., ch. 4, leaves it as it was. The first section, as in the act of 1777, refers to suits *inter partes;* and the enumeration in the second section includes only the proceeding by petition for a road or ferry, as under the act of 1813.

We think, therefore, that the motion in the Superior Court to dismiss the appeal, should have been allowed, and a *procedendo* issued to the County Court confirming their order and directing its execution. Accordingly the judgment of the Superior Court must be reversed, and this opinion certified to that court, that the proper proceedings may now be had there.

Per Curiam. Judgment reversed.

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(66) WILLIAM K. McKINDER, surviving partner, &c., *vs.* THOMAS B. LITTLEJOHN, Adm'r of WILLIAM VAUGHN.

1. Where the attesting witness to a bond is dead, its execution may be proved by proof of the witness's handwriting; but if such evidence cannot be had, then proof of the obligor's handwriting is admissible; but before the latter testimony will be received, the party offering the bond for probate must shew to the court that he has done all in his power, without effect, to procure evidence of the handwriting of the attesting witness. Hence, where it appeared that the subscribing witness to a bond had been clerk of the County Court of a large, populous and wealthy county, and had been dead only twenty-five years, *it was held* not to be sufficient for admitting testimony of the obligor's handwriting, to shew, by one witness only, that he did not know the subscribing witness's handwriting, and did not know of any person who did have such knowledge.
2. The presumption of the payment of a bond, raised by a forbearance for twenty years (or for ten years since our act of 1826, 1 Rev. Stat., ch. 65, sec. 13), may be repelled by evidence, that the debtor had not the means or the opportunity of paying: And the repelling of the presumption will not be hindered by the fact that the debtor had a reversionary interest in certain slaves, but which did not vest in possession until a short time before the suit was brought, when it did not appear that the creditor knew of the existence of the reversionary interest, and it was evident, that it was not, in fact, applied to the payment of the debt.
3. A payment by an administrator of the assets of his intestate to the next of kin, within less than two years after his qualification, and without taking refunding bonds, will not support the plea of fully administered against a non-resident creditor who has brought his suit within three years from the time when the administration was taken.
4. The act of 1715 (1 Rev. Stat., ch. 65, sec. 11), will not operate as a bar to creditors not suing within seven years from the death of the debtor when there is no executor or administrator on the estate of the decedent during that time.

This was an action of DEBT, upon a penal bond, to which the defendant pleaded *non est factum*—payment—fully administered generally and specially, and the acts of 1715 and 1789, for the protection of executors and administrators; and upon the trial at Granville, on the last circuit, the defendant filed the following bill of exceptions:

Be it remembered, that on the trial of the issues joined between the parties in this cause, before the Honorable
(67) JOHN M. DICK, presiding Judge of the said court, the plaintiff produced a paper writing, dated the 19th of August, 1811, purporting to be an obligation, and purporting to have been sealed and delivered by the defendant's intestate, and one John Vaughn, for the penal sum of $3,120.60 cts., to McKinder and White, with a condition underwritten to be void on the payment to the said McKinder and White, of $1,560.30 cts. on or before the 21st of the same month of August; and it being admitted, by the defendant, that the mercantile firm of McKinder and White consisted of the plaintiff and one John White, who, since the 19th of August, 1811, and before the bringing of this action, had departed this life; whereby the right of action on all demands which had been due to the said McKinder and White had enured to the plaintiff's, the said plaintiff produced as a witness one Thomas Vaughn, who deposed that he was well acquainted with Henry J. Burgess, whose name purported to be attached as that of an attesting witness to the said paper writing; that he resided in Halifax county, in this State, at and before the year 1811, and was Clerk of the County Court there for several years, about that period; that he resigned the said office soon after, and died in the year 1815; that he (the witness) had no knowledge of the handwriting of the said H. J. Burgess, except from having examined, within three months before this trial, the records of the County Court of Halifax during the time he was clerk thereof, and which records the witness supposed to have been kept in his handwriting; that the said H. J. Burgess had one brother now surviving him in Halifax, who was not more than fifteen years of age at the death of the said H. J. Burgess; and that witness did not know that his said brother had any acquaintance with the handwriting of the said H. J. Burgess; nor did witness know any one who had such acquaintance with his handwriting; and thereupon the plaintiff's counsel, insisting that by this evidence he had sufficiently accounted for not offering proof touching the handwriting of the said supposed subscribing witness, proposed to exam-

ine the said Vaughn, the witness, as to the handwriting of the said supposed obligors; which was opposed by the
(68) defendant's counsel, but allowed by the Judge; and thereupon the defendant excepted. The said witness then deposed that he was well acquainted with the handwriting of the defendant's intestate, and of the said John Vaughn, who were his brothers, having often seen them write; and that he fully believed, from his said knowledge, that the signatures attached to the said paper writing were in the true and genuine handwriting of the defendant's intestate, and the said John Vaughn respectively; and thereupon the plaintiff's counsel prayed the said Judge to admit and allow the said evidence as good and sufficient evidence for the plaintiff on the said issue joined on the first plea of the defendant, and to instruct the jury that the said evidence, if believed by them, was full and sufficient proof in law that the said paper writing was the deed of the defendant's intestate; and the Judge admitted the said evidence, and gave the said instructions as prayed; and thereupon the defendant excepted. The plaintiff's counsel thereupon, in order to repel the presumption of payment arising from the length of time, offered to prove, by the said Thomas Vaughn, that at the date of the said obligation, both the defendant's intestate and the said John Vaughn were entirely insolvent; that the said John was now living in Georgia insolvent, having been so ever since the date of the said obligation; that the intestate, being so insolvent, removed to Tennessee in 1811, and there commenced the practice of medicine; and after remaining there two or three years, removed thence to the State of Mississippi, and continued there until the time of his death, which was admitted by both parties to have been in the year 1819; that he married in Mississippi, and left a daughter at his death; and that, from time to time, after his removal, until his death, the witness, who was his brother, received letters from him complaining that he continued in low circumstances; that for some years, being affected with a disease which at length caused his death, he was thereby hindered in his practice; and that, in a letter shortly before his death, he commended his daughter to the kind offices of this witness, as he was not in a situation himself to provide for her; to which the defendant's counsel objected; but the objection was overruled by the Judge, and the evidence offered was
(69) received, and the defendant's counsel excepted. And thereupon the said witness, having been examined, and having given evidence in manner and to the effect aforesaid,

although it was admitted by the plaintiff's counsel, that in 1816, an uncle of the said intestate had died, and by his will had bequeathed to the said intestate several negro slaves in remainder, after the death of the widow of the said testator, who departed this life in 1833, and the slaves came to the hands of the defendant, as his administrator, in 1835, being then of the value of the plaintiff's demand, yet the plaintiff's counsel insisted that, upon this evidence, it should be left to the jury whether they were satisfied, upon the consideration thereof, that both the obligors were unable to satisfy the plaintiff's demand, from the execution of the bond, and continually afterwards, and if they were so satisfied, to find the presumption of payment repelled; and the Judge accordingly left the evidence to the jury, and instructed them, that if they were satisfied thereby of the continued inability to pay of both the obligors, from and after the execution of the said obligation, they should find against the defendant on his plea of payment; and to this decision and instruction the defendant excepted. And thereupon the defendant's counsel, in support of the defendant's plea of fully administered, admitting that he administered in 1835, and then received nine negro slaves, assets of his intestate, of value sufficient to satisfy the plaintiff's demand, proved that immediately thereafter he advertised for creditors to exhibit their demand as required by law; that at the expiration of one year from his administration, he, having no notice of the plaintiff's demand, delivered over all the said assets to the next of kin of his said intestate; and although he had taken no refunding bond from the said next of kin, yet he insisted that, under the circumstances of the case, the plaintiff, as well as his deceased partner, having been always residents and citizens of Virginia (as was admitted by both parties), yet if, in paying over the assets to the next of kin, he had acted in perfect good faith, supposing, after the great length of time, that no creditors had any demands, having no notice of the plaintiff's demand then, nor until more than two years after his administration—the jury were at liberty to find that the
(70) defendant had fully administered, and prayed the Judge so to instruct the jury; which instruction the Judge refused to give; but, on the contrary, instructed the jury that, inasmuch as the defendant had paid over the assets, without the two years delay after his administration required by the statute, and without taking a refunding bond, he had not shewn a full administration; and that therefore the jury ought to find on the said plea for the plaintiff. And the defendant's counsel, admit-

ting that no administration of the estate of the intestate had ever been granted before November, 1835, within three years of the commencement of this suit, prayed the Judge to instruct the jury to find for the defendant on his fourth plea of the seven years' bar by the act of 1715, under the facts above stated; which instruction the Judge declining to give, the defendant excepted.

The jury returned a verdict for the plaintiff on all the issues; upon which he had judgment, and the defendant appealed.

Badger, for the defendant, in support of the first exception, referred to *Jones* v. *Blount*, 1 Hay. Rep., 238; *Barnes* v. *Trompowsky*, 7 Term Rep., 261. Upon the 2nd, he cited 2 Stark. on Ev., 310; *Willaume* v. *Gorges*, 1 Camp. N. P. Rep., 217. Upon the 3rd, he commented upon the act concerning executors and administrators, 1 Rev. Stat., ch. 46, and referred to the case of *Chelsea Water Works* v. *Cowper*, 1 Esp. N. P. Rep., 437. And, in support of the 4th exception, the counsel relied upon *McClellan* v. *Hill*, Conf. Rep., 479; *Jones* v. *Brodie*, 3 Murph. Rep., 594; *Hallowell* v. *Pope*, 2 Murph. Rep., 108; *McIntyre* v. *Carson*, 2 Hawks Rep., 544.

Battle, for the plaintiff, cited and relied upon the following authorities, in support of the Judge's charge: On the 1st point, note to *Clements & Co.* v. *Eason & Wright*, 1 Hay., 18 (2nd Ed.); 1 Phil. on Ev., 420, 421, (3 Am. Ed.); Note to *Call* v. *Dunning*, 4 East. Rep., 53, (Day's Ed.); *Fitzgerald* v. *Elsee*, 2 Camp. N. P. Rep., 635, and note to that case; *Ley* v. *Ballard*, 3 Esp. N. P. Rep., 173; *Jones* v. *Blount*, 1 Hay. Rep., 238.

On the 2nd point, *Jayne* v. *Price*, 5 Taun. Rep., 326,
(71) (1 Eng. C. L. Rep., 121); *Oswald* v. *Leigh*, 1 Term Rep.,
270; *Fladong* v. *Winter*, 19 Ves. Jun., 196; *Matthews* v. *Smith*, 2 Dev. & Bat., 287.

3rd. 1 Rev. Stat., ch. 46, sec. 18 & 19, and ch. 65, sec. 12, *Haywood's* note to *Butts* v. *Price*, Conf. Rep., 68; *Leake* v. *Gilchrist*, 2 Dev. Rep., 73; *Norman* v. *Baldry*, 9 Eng. Con. ch. Rep., 437; *Pearson* v. *Archdeaken*, 1 All. & Napier's Irish Rep., 23, cited 2 Harrison's Dig., 1144; *Godley* v. *Taylor*, 3 Dev. Rep., 183; *Goodman* v. *Smith*, 4 Dev. Rep., 450.

4th Question. Swann's Rev., ch. 48, sec. 9; New Rev., ch. 205, sec. 1, 2 & 3; ch. 763, sec. 1; ch. 536, sec. 1; *Jones* v. *Brodie*, 3 Murph. Rep., 594; *McClellan* v. *Hill*, Conf. Rep., 479; *Godley* v. *Taylor*, 3 Dev. Rep., 183; *Rayner* v. *Watford*, 2 Dev. Rep., 338; *Murray* v. *East India Company*, 7 Eng.

Com. Law Rep., 66; 15 Eng. Com. Law Rep., 113; *Webster* v. *Webster*, 10 Ves. Jun., 93.

Gaston, Judge. The court is of opinion that the first of the exceptions taken by the defendant in this case is well founded. Rules of evidence, once settled, become rules of law, and cannot be departed from upon theoretic notions of propriety, or the suggestions of expediency. Among these rules, the following, as we believe, are well settled in the country of our ancestors; and we are confident have been regarded as established in this State for the last half century: When the execution of an instrument, attested by one or more subscribing witnesses, is required to be proved, the party propounding it, must call one at least of the subscribing witnesses to prove it, or shew that proof, by means of an attesting witness, is not in his power. When this is shewn, the next evidence in the order of proof, is evidence of the handwriting of the subscribing witnesses, or of one of them. But if this also be unattainable, then the party producing the instrument is allowed to give evidence of the handwriting of the party by whom it purports to be executed. 1 Stark. on Evid., 320 to 330; *Jones* v. *Brinkley*, 1 Hay. Rep., 20; *Jones* v. *Blount*, 1 Hay. Rep., 238. Whenever proof of an inferior grade is brought forward, it shall not be received until *the court* (72) is satisfied that proof, superior in order, is not within the power of the party. Now, it is clearly impossible to lay down a precise rule of law as to what circumstances must be shewn to convince the court that the party tendering inferior evidence has done his best to procure the superior evidence. If, therefore, in this case, the Judge below had stated on the record, as a conclusion of fact, which he drew from the testimony submitted to him, that it was not in the power of the plaintiff to procure evidence of the handwriting of the attesting witness—or if the circumstances which he has caused to be there stated, were such as would warrant a reasonable inference that this evidence was unattainable—we might well hesitate in reversing this judgment. But the case neither sets forth such a conclusion as having been drawn, nor will it authorise us to presume that it was in fact drawn by his Honor. The attesting witness, when alive, was the clerk of the county court of a large, populous and wealthy county. He had been dead but twenty-five years before the trial. Not an effort was shewn to have been made in the county of the witness's residence, to procure proof of his handwriting. So far from there being room to presume that witnesses as to the character of his handwriting could not be had,

a doubt could scarcely be entertained but that very many such witnesses were to be found, if reasonable exertions were but used to discover them.

The second exception, in the opinion of the court, must be overruled. The presumption against a bond, raised from the lapse of twenty years, without a demand by the obligee or acknowledgment of the obligor, is, in one sense, a presumption of law. The law attributes to such lapse of time a *technical* operation; so that it is the duty of the court, if no opposing testimony be offered, to advise the jury to find the fact of payment. But the inference to be raised, is an inference of fact—liable to be attacked, repelled or confirmed by other testimony. And it is the duty of the triers of the fact, allowing to this technical presumption its *prima facie* force, to find the *fact* as it may appear upon the proofs. Now, it seems to us, that upon whatever ground this presumption rests; whether upon the probability of the fact of payment thence arising—or on a principle
(73) of policy that would shield men from the oppression of claims long negligently forborne—testimony of the kind and to the effect which was offered in this case, was pertinent and in point—tending directly to encounter the alleged probability, and to account for the seeming negligence—and therefore fit to be submitted to the jury, and proper to influence their finding. We have heretofore declared our concurrence in the opinion expressed by Lord Eldon, in *Flandong* v. *Winter*, 19 Ves. Jun., 199, "that the presumption raised by a forbearance for twenty years, may be repelled by evidence that the debtor had not the means or opportunity of paying." *Matthews* v. *Smith*, 2 Dev. & Bat. Rep., 287. Upon further reflection, we entertain the doctrine still; and also, that if such evidence does satisfy the jury that in truth payment has not been made, it is their duty so to find upon the fact in issue. Nor do we think the circumstance relied on by the defendant, is sufficient to withdraw the present case from the operation of this doctrine. The interest in remainder, which the defendant's intestate had in the negroes bequeathed by his uncle's will, was, indeed, one which, during the life of his uncle's widow, might have been applied to the payment of the debt now in suit. But all supposition that it was so applied, is repelled by the fact that *all the negroes*, upon the death of the tenant for life, came to the possession of the defendant. And so, if it could be brought home to the creditor that he knew of this interest in remainder, an inference of negligence, in forbearing, for so many years, from any effort to subject it to his demand, might be raised against him; but, as

the intestate himself forbore wholly, notwithstanding his necessities, from making any use of this interest, it might be that he was ignorant thereof, and still more probable that these creditors knew not of it. How this might be, was a circumstance fit to be considered by the jury.

We are clearly of opinion that the third exception is unfounded. The delivery of the assets of the intestate, by the defendant, to the next of kin, before the expiration of two years from his qualification, and without taking refunding bonds, is not a legal administration of the assets against a creditor. Undoubt-
(74) edly there are some few—they are very few—requisitions imposed by our acts of Assembly, upon the executors and administrators of deceased persons, which cannot be performed by, and are manifestly inapplicable to, those whose testators or intestates did not reside amongst us. By a legitimate construction of the acts, so far, and so far only, as these requisitions are impracticable and inapplicable, such executors and administrators are excused therefrom. But, with this exception, all who here take probate of wills, or obtain letters of administration of the estate of deceased persons, are bound to observe the laws here in force, for the government of executors and administrators.

Upon the last exception, we have felt much perplexity. After every effort, we find it impossible to reconcile to each other the decisions which have been made upon the act of 1715. (1 Rev. Stat., ch. 65, sec. 11.) The difficulty of admitting any equitable exposition of the act, without a violation of its language, has, at times, caused a strict adherence to its terms. At other times, the shocking injustice resulting from a literal interpretation, has obtained for it an equitable construction, almost in defiance of its words. Under these circumstances, we feel it our duty to consider the latest adjudications as fixing the true principles of the act. *Jones* v. *Brodie*, 3 Murph. Rep., 594, and *Godley* v. *Taylor*, 3 Dev. Rep., 178, have established that the injunction on creditors to make claim within seven years after the death of the debtor, under the penalty of being utterly barred of any recovery against his estate, does not apply when there is no person in being authorised by law to make the claim—or where the claim itself is in a state not then to be prosecuted—and these decisions are avowedly made upon the ground that, until there be such a person to make claim, and such a claim as can be prosecuted, there is no cause of action; and the bar of the act of 1715 does not begin to run. Unless this ground be abandoned, it must

also be held, that unless there be a person against whom claim may rightfully be made, the bar of the statute does not attach. It is indispensable to the prosecution of a claim, that there should be a person in being, against whom it may of right be demanded, as that there should be a rightful claimant
(75) in existence, to bring it forward; or that the claim be of such a nature as that its performance may be demanded. The moment it is established that this act is in the nature of an act of limitations, the bar of which does not begin to run until there is a cause of action, that moment it follows, that the want of a representative of the debtor, as well as of a representative of the creditor, takes the case out of the bar of the statute. Cause of action is the right to prosecute an action with effect; and, legally, a cause of action does not exist, until there be a person in existence capable of suing, and also a person against whom the action may be brought. See *Douglas* v. *Forrest*, 4 Bing. Rep., 686; (15 Eng. Com. Law Rep., 113); *Murray* v. *East India Company*, 5 Barn. & Ald., 204; (7 Eng. Com. Law Rep., 66); *Webster* v. *Webster*, 10 Ves. Jun., 93.

For the error assigned by the defendant, in the first exception, the judgment must be reversed and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

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(76) THE STATE *vs.* JARROTT, a slave.

1. The great distinction between homicide committed with malice, and that committed in a transport of passion, suddenly excited by a grievous provocation, is as steadily to be kept in view, in the trial of a slave charged with the murder of a white man, as in that of a whi e man charged with the murder of his equal, or of a slave. But the same matters which would be deemed in law a *sufficient provocation* to free a white man, who has committed a homicide in a moment of passion, from the guilt of murder, will not have the same effect when the party slain is a white man, and the offender a slave: For though among equals, the general rule is, that words are not, but blows are, a sufficient provocation, yet there *may be* words of reproach so aggravating when uttered by a slave, as to excite in a white man the temporary fury which negatives the charge of malice; and this rule holds without regard to the personal merit or demerit of the white man.

2. The insolence of a slave will justify a white man in giving him moderate chastisement with an ordinary instrument of correction at the moment when the insolent language is used, but it will not authorise an excessive battery, as with a dangerous weapon, nor will it justify an attack upon the slave for even moderate correction, if the insolence be past at the time.

3. The rule that where parties become suddenly heated, and engage immediately in mortal conflict, fighting upon equal terms, and one kills the other,

the homicide is mitigated to manslaughter, applies only to equals, and not to the case of a white man and slave, if the slave kill the white man while fighting under such circumstances.

4. An ordinary assault and battery, committed by a white man upon a slave, will not be a sufficient provocation to mitigate a homicide of the former by the latter, from murder to manslaughter; but a battery which endangers the slave's life will be a sufficient provocation to produce that result. In the cases between these extremes, that is a legal provocation of which it can be pronounced, having due regard to the relative condition of the white man and the slave, and the obligation of the latter to conform his instinct and his passions to his condition of inferiority, that it would provoke well disposed slaves into a violent passion.

5. Although there be a legal provocation, yet a homicide will be murder, if committed under such circumstances of cruelty as manifest the thoroughly wicked heart. And cruelty, when the *facts* from which it is to be inferred all distinctly appear, is an inference of law, and, therefore, properly drawn by the court. But where no more is stated than that several blows were struck with a stick of curled hickory of the ordinary size, and with the larger end thereof, without stating more of the nature of
(77) those blows than that one of them was mortal, the facts are not so set forth as to leave the question of cruelty as one for legal inference.

6. If the weapon, with which a homicide was committed, were not of the character called deadly, that is, likely to produce death or great bodily injury, the homicide would not be murder, although committed without legal provocation. And there are many cases in which the court can distinctly see, from the nature of the instrument used, whether it be of a deadly character or not; and, therefore, need not that the jury should directly find the fact for their information. But where it only appears that the weapon used was a stick of curled hickory of the ordinary size, and that the slayer struck with the larger end thereof, it falls peculiarly in the province of the jury to ascertain whether such a weapon, so used by the slayer, was likely to produce fatal consequences or not.

The prisoner, a slave, was indicted at Person, on the last circuit, before his Honor Judge DICK, for the murder of one Thomas Chatham, a white man. The Solicitor for the State called, as a witness, one John T. Brooks, a white boy, about fourteen years of age, who stated that he went with the deceased, who was eighteen or nineteen years old, to a fish-trap, in the neighborhood, where several slaves were collected, on Saturday night; that the witness and the deceased were the only white persons present; and that they remained there until about two or three hours before day, when Chatham was killed; that the prisoner and one Jack Hughes, a free negro, played cards, and differed about the game, when they called on the deceased to keep the game for them, which he did for some time, until a second difference took place between the parties, and Hughes refused to play longer; that the prisoner had a twelve and a half cent piece of coin, upon a handkerchief, on which they had been playing—which fell off among the leaves, when he jerked up

the handkerchief; that the prisoner, shortly after, went and looked for the piece of money, where it had dropped; and, not finding it, said that he saw his nine pence walk into a white man's pocket, and that any white man who would steal a negro's money, was not too good to unbutton a sheep's collar; that the prisoner further said that the deceased was raised and had lived on stolen sheep; that the prisoner then charged the deceased with stealing his money, and told him if he did not give it up, he would kill him—and brandished a stick over the head
(78) of the deceased; that the prisoner further told the deceased that he had his nine pence in his left jacket pocket, upon which the deceased requested the prisoner to search him; which the latter refused to do; that the deceased then turned out his pockets, and the prisoner then cursed him, and told him that he had the money in his shoes; upon which the deceased took off his shoes and stockings; that shortly afterwards, some of the company got a light, and, in searching, found the piece of money in the leaves, near where the deceased stood when he turned out his pockets and pulled off his shoes, and six or seven steps from the spot where the prisoner jerked up his handkerchief, as before stated; that the deceased then took a seat near the fire, and the prisoner continued to abuse him, using very indecent and insolent language towards him; that the deceased then asked the witness for his knife, saying that he wished to cut his nails; that the witness handed his knife to the deceased, who then told the prisoner that if he did not hush, he, the deceased, would stick his knife in him; upon which the prisoner drew his stick, and told the deceased to do it if he dared; that the prisoner continued to use insulting language to the deceased, who took up a piece of a fence rail about as long as the witness's arm, and, having the knife still in his hand, made at the prisoner, and ran him twice around the fire, and then ran him off, and returned, himself, to the fire; that the prisoner soon after returned within ten or eleven steps of the fire, and said something, which the witness did not understand; upon which the deceased took up the piece of rail, and, having the knife still open in his hand, went towards the prisoner; that the witness then heard two blows, and, upon going to the place, found the deceased on the ground. The witness described the stick of the prisoner to be about three feet long, made of curled hickory, about the size of a common walking cane, larger at the butt end, and with a string attached to the small end, to fasten around the prisoner's wrist. The knife was exhibited in court; and was a

common-sized pocket knife—the blade about three inches long, and sharp at the point.

A negro slave, by the name of Isaac, was then called as a witness for the State; and concurred, in most points,
(79) with the witness Brooks. He stated that the deceased and the prisoner gave each other the damned lie, when talking about the nine pence; and also, that the prisoner had his stick in his hand during the quarrel; but, he did not see him shake it over the deceased's head. He stated, also, that after the money was found, the quarrel ceased for a short time—perhaps fifteen minutes—when the deceased renewed the quarrel, and swore he would kill the prisoner, and made at him, as described by the witness Brooks. Isaac also stated that, as the deceased approached the prisoner, he heard the latter tell him not to hit or strike him. The witness heard a blow, and, upon looking towards the parties, saw the deceased falling, and saw the prisoner strike him four or five blows with the stick above spoken of. In all his other statements, this witness fully sustained Brooks.

Nathan Jones, a free negro, was next examined by the State. He fully sustained Brooks, except that he concurred with Isaac in stating that there was a cessation in the quarrel, and that the deceased renewed it. This witness also stated that the prisoner did not shake his stick over the head of the deceased; but had it drawn back in a striking position. He also stated that he heard a blow, and looked at the parties, when he saw the deceased on the ground, and the prisoner strike him three or four blows, with the stick before described. Two witnesses, who were examined on that subject, stated that the deceased had two wounds on the back part of the head, each about two inches in length; and one of the witnesses said that he inserted his finger about one fourth of an inch into one of the wounds, and found no resistance to its entrance. The deceased was described, by one witness, as small and slender for a boy of his age; and by another, as not tall, but stoutly built. The prisoner was about six feet high, and of the ordinary size of negroes of that height; and was about twenty-three years of age.

The prisoner examined Jack Hughes, a free negro, who fully sustained Brooks and the other witnesses in the general history of the transaction. He deposed further, that when the deceased approached the prisoner, he struck at the prisoner and
(80) missed him, and the witness thought he was not near enough to reach him when he struck; and that the pris-

ouer immediately struck the deceased with his stick and knocked him down, and gave him several blows after he was on the ground.

The wituess, Nathan Jones, stated also, that when the deceased renewed the quarrel, as before mentioned, he swore he would kill the prisoner that night; that if he did not, he would go to his master on Monday morning, and have him whipped to his satisfaction; and he would then waylay him and shoot him with a rifle.

Alexander Jones was then called, and deposed that he was in company with the deceased, when on his way to the fish trap, that night; that deceased said, he wished that he had borrowed Mr. Long's knife, for he might get into a scrape, and if so, he would need it.

The witness, Brooks, deposed before the coroner, that the prisoner told the deceased not to come to him, or he would knock him down. Upon his examination in court, he did not recollect that the prisoner had made such a remark to the deceased; nor did the witness remember that he had made such a statement before the coroner.

The prisoner's counsel asked the court to instruct the jury, "that, in trials affecting life, a negro slave should not be convicted of murder, unless a white man would be convicted on the same evidence.

2ndly, That if the jury should be satisfied that the deceased did steal the nine pence from the prisoner, the deceased had no right to strike the prisoner, for insulting language, in consequence of it; and in that aspect of the case, the prisoner was entitled to be regarded as a white man on this trial.

3rdly, That if the deceased was advancing on the prisoner, with the knife and piece of rail, and struck at him with the latter immediately, before the prisoner struck him with his stick, then it was a case of mutual combat; and although the prisoner might have courted the conflict, the killing would be only manslaughter.

4thly, That the deceased had no right to correct the prisoner, with the piece of rail or the knife, for insolent lan-
(81) guage; but ought to have applied to his master, or to a justice of the peace, for redress."

The court refused to give the instructions prayed for, but charged the jury "that, if the prisoner used the insolent language, to the deceased, deposed to by the witnesses, the deceased had a right to correct him, although such language was used by

the prisoner, upon the supposition that the deceased had stolen his money. That if they were satisfied that the prisoner used the provoking language, to the deceased, as stated by the witnesses, the deceased had a right to whip him; and if, in the exercise of this right, the prisoner killed him, it would be murder, unless the prisoner had good reason to believe that the deceased would kill him, or do him some great bodily harm. And, for the purpose of ascertaining whether the prisoner had good reason to apprehend death, or great bodily harm, at the hands of the deceased, it was proper for them to take into consideration the comparative size and bodily powers of the parties, and their weapons. That if the prisoner had good reason to apprehend either death or great bodily harm, it would extenuate the killing to manslaughter; but if not, it would be murder."

The jury found the prisoner guilty of murder. A motion for a new trial was then made, which, being overruled, and sentence of death pronounced, the prisoner appealed.

W. A. Graham, for the prisoner, cited and commented on the *State* v. *Tackett*, 1 Hawks, 217; *State* v. *Hale*, 2 Hawks, 582; *State* v. *Reed*, 2 Hawks, 454; 1 Rev. Stat., ch. 111, sec. 41; 1 East's Cr. Law, 241; 1 Russ., 702, 715, 717; Foster, 295; 2 Chit. Cr. Law, 482; 2 Stark. on Ev., 524.

The Attorney General, for the State, argued *contra*, and contended that the authorities cited for the prisoner supported the propriety of the Judge's instructions.

GASTON, Judge. We are of opinion that the Judge did not err, in refusing to give the first instruction which was prayed for by the counsel for the prisoner. It is not questioned but that the prisoner was entitled to the benefit of all those
(82) humane principles of the common law, which, in indulgence to the frailties of human nature, extenuate the guilt of homicide from murder to manslaughter. The great distinction between homicide committed with malice, and homicide committed in a transport of passion, suddenly excited by a grievous provocation, is as steadily to be kept in view, in the trial of a slave charged with the murder of a white man, as in that of a white man charged with the murder of his equal, or of a slave. But, it cannot be conceded that the same matters which would be deemed in law a *sufficient provocation* to free a white man, who had committed a homicide, in a moment of passion, from the guilt of murder, will have the same effect, when the party slain is a white man, and the offender a slave. It has

been authoritatively held, that the killing of a slave by a white man may be reduced from murder to manslaughter, by acts, which, proceeding from a white man, would not in law constitute a sufficient provocation. Among equals, the general rule is, that words are not, but blows are, a sufficient provocation; while in Tackett's case, it was declared that there *might be* words of reproach, so aggravating when uttered by a slave, as to excite the temporary fury which negatives the charge of malice. *Tackett's case*, 1 Hawks, 217, 218. This difference in the application of the same principle, arises from the *vast* difference which exists, under our institutions, between the social condition of the white man and of the slave; in consequence of which difference, what might be felt by one as the grossest degradation, is considered by the other as but a slight injury. And from the same cause, it must necessarily follow, that some acts, which between white persons are grievous provocations, when proceeding from a white person to a slave—whose passions are, or ought to be tamed down to his lowly condition—will not, and cannot be so regarded. The degrees of homicide are indeed to be ascertained by common law principles; but the principles themselves are necessarily, in their application, accommodated to the actual conditions of human beings in our society.

Nor do we apprehend that there was error in refusing to give the second instruction which was prayed for. It is the difference of condition between the white man and the slave—
(83) as recognized by our legal institutions—and not the difference between personal merit and demerit—which creates a legal distinction between the sufficiency and insufficiency of the alleged provocation. *This* distinction, therefore, must be as broad as *that* difference—or it would not only be unsuited to the state of our society, and incompatible with the subordination of ranks essential to the safety of the State—but would be too vague to be admissible as a legal rule. It may be, that the white man who debases himself by a familiar association with a slave, and, in the course of that association, is guilty of acts of meanness like that attributed—whether justly or unjustly—to the unfortunate deceased—has not claims to personal respect equal to those of the slave; but the distinction of castes yet remains, and with it remain all the passions, infirmities, and habits, which grow out of this distinction.

With respect to the fourth instruction prayed for by the prisoner's counsel, we hold that the Judge did err in refusing it, and instead thereof directing the jury, as we understand him to have

directed, that the deceased had a right, because of the prisoner's insolence, to attack the latter with the knife and fence rail. In the case of the *State* v. *Hale*, 2 Hawks, 582, it was decided that the battery of a slave, by any other than his master, was *per se* a public offence; but, at the same time it was declared, that such a battery might be justified, if not excessive, by circumstances which would form no justification for the battery of a white man. It was not attempted to *define* those circumstances—nay, it was pronounced *impossible* to do so with precision. The nearest approach to a definition was, that the circumstances must be of such a character as warranted the apparent breach of the public peace, "under the habits and feelings of society, securing at the same time, the white man from injury and insult, and the slave from needless violence and outrage." Where we can find a rule established, it is our duty to adhere steadily to it. Wherever our predecessors have declared it impossible to draw the line, we dare not attempt it.

We feel our-selves, therefore, bound to say, that insolence of a slave does not justify an excessive battery; and we can-
(84) not hesitate to hold, that an assault with a sharp pointed knife, three inches long, and a piece of fence rail of the length of one's arm, is an attempt to commit an excessive battery—because these are not lawful instruments wherewith to check or to correct insolence. The language of his Honor indeed, is, "that if the prisoner used the provoking language testified by the witnesses, the deceased had a right to *whip* him;" but, by the phrase "whip," he must necessarily be understood as meaning to whip in the manner testified by the witnesses. But, if the language used were intended to convey only the idea of moderate chastisement, by an ordinary instrument of correction, the correctness of *that* instruction would depend materially upon the fact whether the insolence had been discontinued, or was going on at the moment of correction. Upon this point, the testimony seems to have been contradictory, or, at all events, was not free from doubt. One witness represented the reproachful language of the prisoner as continuing uninterrupted up to the moment of the conflict—while the others stated that it entirely ceased upon the finding of the piece of money. How the fact was, it was the peculiar province of the jury to determine; and, in determining that fact, it might be very material to ascertain what was the motive of the prisoner's return, after he had been chased off by the deceased, and what the manner of his behaviour, when he so returned. If the insolence had been

clearly discontinued, then the attack of the deceased upon the prisoner was for vengeance on account of past insolence, and not in order to stop continuing abuse. And, on this point, we are instructed by our predecessors that it is not necessary, in any case, that a person who *has received* an injury, real or imaginary, from a slave, should carve out his own justice; for the law has made ample and summary provision for the punishment of all trivial offences committed by slaves, by carrying them before a Justice, who is authorised to pass sentence for their being publicly whipped. This provision, while it excludes the necessity of private vengeance, would seem to forbid its legality, since it effectually protects all persons from the insolence of slaves, even where their masters are unwilling to correct them upon complaint being made. *State* v. *Hale*, 2 Hawks, 585.

(85) If we could reconcile such a course to a sense of duty, we should forbear from examining the case any further. The prisoner was entitled to have the law applicable to his case correctly expounded to the jury. This, in our judgment, was not done; and, as the verdict may have been affected by that error, it is proper that he should have another trial. But, it is impossible not to see, that upon that trial, the other questions which have been here argued must occur; and, therefore, so far as we have formed a decided judgment upon them, we cannot rightfully decline from now declaring it.

One of these is connected with the third instruction prayed for by the prisoner's counsel. If it be the meaning of that instruction that the case of the prisoner falls within the rule which obtains where parties become suddenly heated, and engage immediately in mortal conflict, fighting upon equal terms, and one killeth the other; we are obliged to say that the case of the prisoner is not within that rule. In mitigating the offence to manslaughter, where death ensues upon a sudden rencounter of this sort, the law shews its indulgence to that frailty of human nature which urges men, before they have an opportunity for reflection, to a compliance with those common notions of honour which forbid either to give way to, or acknowledge the superior prowess of, the other. Such notions spring from a sense of equality, and the horror of personal disgrace. They do not prevail—they ought not to exist—between those who cannot *combat* with each other, without degradation on the one hand, and arrogance on the other. If that instruction is predicated upon the ground that the first assault, having been made by the deceased, constituted a *provocation* for the homicide committed

by the latter, it then presents enquiries by no means free from embarrassment.

As yet a precise rule has not been laid down by which to pronounce what unlawful interference with the person of a slave by a white man, shall be deemed a provocation sufficient to excite that transport of passion, which, although a deadly weapon is used, may extenuate the killing of the assailant into manslaughter. And by whomsoever the attempt to prescribe such
(86) a rule shall be made, he will find it no easy task to form a rule which shall consist with the principles of public policy on the one hand, and with the just claims of humanity on the other. The superior rank of the assailant—the habits of humility and obedience which belong to the condition of the slave—habits which are not less indispensable to his own well-being than required by the inveterate usages of our people—clearly forbid that an ordinary assault or battery should be deemed, as it is between white men, a legal provocation. The law will not permit the slave to resist. It his duty to submit—or flee—or seek the protection of his master; but is impossible, if it were desirable, to extinguish in him the instinct of self-preservation; and although his passions ought to be tamed down so as to suit his condition, the law would be *savage*, if it made no allowance for passion. He may have been disciplined into perfect obedience to the will of his master, and, therefore, habitually patient under *his* correction; but he cannot but feel a keen sense of wrong when authority is wantonly usurped over him by a stranger, and exercised with cruelty. There is therefore no difficulty in laying it down that a battery which endangers his life or great bodily harm—proceeding from one who has no authority over him—will amount to such a provocation. But between these extremes there are intermediate injuries of various grades. In regard to them, we are obliged to resort to the primary rule which pronounces on the character of provocations, and apply it according to the circumstances of each case. That is a legal provocation of which it can be pronounced, having due regard to the relative condition of the white man and the slave, and the obligation of the latter to conform his instinct and his passions to his condition of inferiority, that it would provoke well disposed slaves into a violent passion. And the application of the principle must be left, until a more precise rule can be formed, to the intelligence and conscience of the triers.

Two other points have been presented to our consideration, in the course of the argument, upon which it is proper to express

our views. It has been correctly stated by the Attorney General, that although there should be a legal provocation, yet
(87) the homicide will be murder, if committed under such circumstances of cruelty as manifest the thoroughly wicked heart—and he has insisted that such circumstances of cruelty are manifested in the case before us. Cruelty, when the *facts* from which it is to be inferred all distinctly appear, is an inference of law; and, therefore, properly drawn by the court. But in this case, the facts are not so set forth as to leave the question of cruelty one for legal inference. No more is stated, than that several blows were struck with a stick of curled hickory of the ordinary size, and with the larger end thereof, without informing us more of the nature of those blows, than that one of them was mortal. On the part of the prisoner, it has been insisted, and properly insisted, that if the weapon used was not of the character called deadly, that is, likely to produce death or great bodily injury, the homicide would not be murder, although committed without legal provocation; and it has been argued, that in this case the weapon was not of that character. No doubt there are many cases, in which the court can distinctly see, from the nature of the instrument used, whether it be of a deadly character or not; and, therefore, need not that the jury should directly find the fact for their information. But this is not a case of that kind. It is one in which it falls peculiarly within the province of the jury to ascertain, whether such a weapon, in such hands, and as it was used, was likely to produce fatal consequences or not.

This opinion must be certified to the Superior Court of Person, with directions to award to the prisoner a *venire de novo*.

PER CURIAM. Judgment to be reversed.

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(88) MARTIN ROBERTS *vs.* PETER SCALES et al.

A sheriff who, after seizing goods, leaves them on the premises of the debtor, not separated from the other goods of the debtor, and for the use of the debtor or his family as before the seizure, thereby *prima facie* loses his property in them, upon the grounds of presumptive fraud or abandonment; and another officer may seize and sell them, unless the delay to remove them be but for a reasonable time, and then be accounted for by the state of the property, as for example, that it was a growing crop, or an article in the course of being manufactured, or the like.

This was an action of TROVER for a grey horse, formerly the property of one Absalom W. Scales—Plea the general issue. Upon the trial at Rockingham, on the last circuit, before his

Honor Judge DICK, it appeared that the plaintiff was the sheriff of Rockingham county, and as such, on the 25th of July, 1839, had in his hands an attachment against the said A. W. Scales, at the instance of Rose, McAdoo & Scott, for the sum of $365, returnable to the ensuing term of Rockingham County Court; and on that day he went to the house of the said Scales, and there, the property being present, levied the attachment on the horse in question, and other articles of personal property, as well as on sundry houses and lots. This levy the plaintiff endorsed upon his attachment, and announced his intention to take the personal property away, if a forthcoming bond were not given. The plaintiffs in the attachment all being present, then told him that they did not wish it taken away from Mrs. Scales; and that they would acquit him of all responsibility in leaving it there; that Mr. Rose, one of the plaintiffs, was boarding with Mrs. Scales, and would know if any of the property was carried off. A deputy sheriff, by whom the defendants proved this conversation, also proved that he did not consider the levy abandoned; and further, that Mrs. Scales was not present at the conversation and agreement to leave the property. The attachment aforesaid was returned to the August Term of the said County Court, which commenced the 26th day of that month, when and where the necessary orders were made; and, at the ensuing term, in November, final judgment was rendered for the plaint-

(89) iffs' demand, and a *venditioni exponas* was issued, returnable to February Term, 1840, under which all the property levied on, except the horse, was sold; and was insufficient to satisfy the execution.

The defendant, Sharp, was a constable of Rockingham county; and, by virtue of an attachment issued by, and returnable before, a Justice of the Peace, in favour of the other defendant against the said A. W. Scales, went to his house, on the 24th day of August, 1839, levied on the horse in question, and took him into his possession. On his way home, in answer to an enquiry whether he did not know that the sheriff had levied on the said horse, he replied that he did know of it. This attachment was prosecuted to final judgment; and the present defendants, though forbid by the present plaintiff, sold the horse under an execution issuing upon it.

His Honor instructed the jury, that if they were satisfied of the truth of the facts alleged by the plaintiff, his levy was a valid one; and that his leaving the horse on the premises, under the circumstances stated, was not an abandonment of the lien created

by the levy; and that the defendants were not justified in taking the horse under the attachment issued by the justice. The plaintiff had a verdict and judgment, and the defendant appealed.

W. A. Graham, for the defendants. The leaving the horse in the possession of no one, was an abandonment, which rendered him liable to any other levy. *Blades* v *Arundell*, 1 Maule and Selw., 711; *Pollister* v. *Pollister*, 18 Eng. C. L. Rep., 177; *Ackland* v. *Paynter*, 8 Price's Rep., 95. There was error, therefore, in the Judge's charge.

J. T. Morehead, for the plaintiff. On the part of the plaintiff it is insisted, that there was no error in the charge of the Judge. This court held, in *Gilkey* v. *Dickerson*, 3 Hawks, 293, that it was not necessary, to constitute a levy, that the sheriff should remove the property out of the defendant's possession. Were the law otherwise, it would, in many cases, be untrue to itself. Ponderous articles would either be exempt from levy, or subject the officer or defendant in the process, to hardship—the sheriff must either remove it at his own expense, or subject the defendant to the additional expense of removal. When a levy

(90) is once made, the property is *in custodia legis* until sold. The officer has a qualified interest in it, and he is responsible to the plaintiff. What he does with it, between the levy and sale, is a matter of private arrangement between him and his agent or bailee. If he select the plaintiff as agent or bailee, it *divests* him of no right, but may exonerate him from responsibility, in the event of a faithless agent. In the present case, there was no abandonment of the levy intended, nor was there any, unless the conclusion of law, from the facts stated, amounted to an abandonment.

RUFFIN, Chief Justice. In bringing trover, the plaintiff affirms the property to be in him, by virtue of the attachment. He puts his case, therefore, on the same footing as if the horse had been taken under a *fieri facias;* and, therefore, it may be assumed that he is right. At all events, a sheriff derives, under an attachment, no better right in the defendant's property, than he would under a *fi. fa.* How, then, would it stand, if these seizures had been upon executions, instead of attachments?

On that point, our opinion is, decidedly, that a sheriff, who, after seizing goods, leaves them on the premises of the debtor, not separated from the other goods of the debtor, and for the use of the debtor or his family, as before the seizure, does thereby *prima facie* lose his property in them, upon the grounds

of presumptive fraud or abandonment; unless the delay to remove them be but for a reasonable time, and then be accounted for by the state of the property—as for example—that it was a growing crop, or an article in the course of being manufactured, or the like.

We believe the decisions on the point in our own country are not uniform. But, in England, the doctrine seems settled; and, as far as we are apprised, that doctrine has prevailed in this State. If the creditor himself direct the sheriff not to seize property, or, after seizing, not to remove or sell it, and then another creditor deliver his execution, the sheriff may and ought to satisfy the latter. The conduct of the former creditor is deemed fraudulent; and, therefore, he is postponed, and is deprived
(91) of any remedy against the sheriff, who only obeyed instructions. *Rice* v. *Sarjeant*, 7 Mod., 37; *Bradley* v. *Wyndham*, 1 Wils., 44; *Edwards* v. *Harbin*, 2 T. R., 596; *Palmer* v. *Clarke*, 2 Dev. Rep., 354. If, by directing such conduct in the officer, or concurring in it, the creditor loses his lien on the property and his action against the sheriff, it follows, where the refusal or deceptive delay to proceed on the execution is the act or omission of the sheriff himself, that *he* cannot have redress against another creditor or his officer, who seizes the debtor's goods in execution. The action against a person who takes goods out of the sheriff's pos-session, is given to the sheriff, not for the benefit of the creditor, but for the benefit of the sheriff. The creditor is secure in the responsibility of the sheriff for not seizing property when he can; and to the value of property once seized, though not sold, because it was taken away by another person. *Sly* v. *Finch*, Cro. Jac., 514. The creditor cannot sue a trespasser; but he looks to the sheriff, and the latter to the trespasser. For the indemnity of the sheriff, therefore, the law vests the property in him, and gives him appropriate actions. Therefore he must be careful not to do, of his own accord, an act, which, if done by the direction of the plaintiff in the execution, would discharge the property from that execution, as against another creditor or his officer. Accordingly, we find it laid down by the text writers, that after a sheriff has seized goods, it is his duty to remove them to a place of safe custody, until they can be sold. This is a duty so simple in itself as to be easily understood, and as easily performed; and, therefore, there should be no encouragement to its non-observance. It is usual, in England, for the sheriff to remove goods immediately; or to leave his bailiff in charge of them on the premises,

either until they can, within a reasonable time, be removed, or, by the consent of the debtor, until the sale. But, unless they be removed, or some person be left in charge of them, the goods are in the possession of the debtor himself, and not *in custodia legis;* and, consequently, are liable for the party's other debts. The modern case of *Blades* v. *Arundale*, 1 M. & S., 714, was decided on this single point. The sheriff, after levying
(92) a *fi. fa.*, went away from the premises, leaving no one in charge of the goods, and the landlord distrained them for rent; upon which the sheriff brought trespass. Lord ELLENBOROUGH said he was not aware of any case where, upon an abandonment of the possession by the sheriff, the goods had still been holden to be in the custody of the law, so as to make a party distraining them a trespasser. So, likewise, we think it must be as to making that act a conversion. For, how does the property become vested in the sheriff? It is by the seizing, the taking them into possession; and nothing less. The execution only creates a lien; the taking possession carries the property. Then, *e converso*, the property which was gained by the possession, also goes with it.

If this be so in England, there is yet more reason for adhering closely to the rule in this State. With us, process of execution is issued from so many different tribunals, Federal and State, and it is confided to so many different and independent officers as to make it highly expedient, with a view to the interests of creditors and the safety of officers, that we should not put this question upon nice distinctions, but upon some broad general principle, intelligible to officers, and conducive to the healthy administration of justice, though in some few cases it may be productive of some hardships, or inconveniences. The rule can only be called into operation in the cases of insolvent defendants; and, in such cases, it is better for all parties the true state of things should be known at once. The true principle, therefore, as we think, is, that the property of a debtor, as against his creditors, ought not, by operation of law, to be divested and vested in the sheriff, but by some act as obvious and notorious as the nature and state of the property will permit. That, in the case of ordinary personal chattels, like the present, is effected by taking and keeping possession, and by that only; and, therefore, it is required. In thus speaking, we consider that we are only repeating what has ever been deemed to be law in this State. For, we believe the custom has been uniform, either to remove the goods at once, or in some way to take them out of the debt-

or's disposal and use; or instead of leaving a bailiff in
(93) charge, to take a forthcoming bond, as permitted by the act of 1807. (1 Rev. Stat., ch. 45, sec. 17.) That act, however, does not authorise the goods to be left on the premises and keep them bound, as against other executions. For, it merely allows the sheriff to obtain that indemnity for himself, without changing his responsibility. He is not obliged to take the bond; and, if he takes it and leaves the property, he does so at the risk of the surety in the forthcoming bond; and, in case of his failure, at his own risk; unless, indeed, the surety procure the sheriff to leave him, the surety, or some one else as the sheriff's deputy, in charge of the goods. *Denson* v. *Sledge*, 2 Dev., 136; *Gray* v. *Bowls*, 1 Dev. & Bat., 437. Here, it is stated expressly, that the horse was left for the use of the debtor's family, and no one was left in charge.

Sharpe's knowledge of the sheriff's seizure cannot have any effect; for he knew also of its abandonment; and he was therefore bound to take it on the process in his hands.

Wherefore we deem the judgment erroneous, and direct a *venire de novo*.

PER CURIAM. Judgment reversed.

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(94) JONATHAN BLACKNALL et al. *vs.* JAMES WYCHE, Adm'r of THOMAS BLACKNALL, Sen'r, et al.

Where a testator, after giving certain legacies to his children, and directing that the residue of his estate should be equally divided between them, upon their accounting for the advancements which they had received, added, "this direction is not to apply, in case a negro lent or given shall die before me, that being my loss; but when any of the said negroes shall have been sold, or suffered to be sold, they shall be charged at their value at the period of such sale, except in case of my grandson T., son of my deceased son G. B., who is to pay to my executors $500, in full of all advancements made to him or to his father;" *it was held* that the grandson was bound to account for only the sum of $500, and not for that sum, in addition to the value of two negroes which had been given to his father and sold by him; and that no parole evidence could be received to shew that the testator intended his grandson to account for the $500, in addition to the value of the said negroes given to his father.

The question, in this case, arose upon a petition for the settlement of the estate of Thomas Blacknall, senoir, deceased, and was as follows: By the fourth and fifth clauses of the said Thomas Blacknall's will, he bequeathed as follows, viz:

"Fourthly. The residue of my estate of every description I wish to be divided between all my children equally, except those named in the foregoing clause; subject to the limitations and

restrictions which may hereafter be annexed to any of the said bequests; and where any of my children may have died, or shall die, the child or children of such deceased child shall stand in the place of his or their parent; but nothing in this clause is to be construed so as to give to the present or future children of Nancy Hayes or Lucy Hicks any share in my estate."

"Fifthly. It is my will and desire, that all my childen and their representatives claiming any interest in my estate under the foregoing clause, shall, before receiving their share, account with my executors for the negroes I may have heretofore lent or given, or shall hereafter lend or give, at their value, at the time of my death. This direction is not to apply, in case a negro lent or given shall die before me, that being my loss; but when any of the said negroes shall have been sold, or suffered
(95) to be sold, they shall be charged at their value at the period of such sale, except in the case of my grandson Thomas, son of my deceased son George Blacknall, who is to pay to my executors five hundred dollars in full of all advancements made to him or to his father."

The father of Thomas Blacknall, Junior, had received from the testator, in his life-time, as advancements, two negro slaves. The plaintiffs insisted that by the true construction of the said clauses of the testator's will, the defendant, Thomas Blacknall, Jun., was bound, in dividing the residue, to account as well for the value of the said two negro slaves, as for the said sum of $500, in the 5th clause of the will mentioned; while the defendant, the said Thomas, contended that by the true construction of the said clauses, he was bound only to account for the said sum of $500. And this question being presented at the hearing at Granville, on the last circuit, before his Honor Judge DICK, he was of opinion that the latter construction was right; and thereupon the plaintiffs, insisting that if the meaning contended for by them did not appear upon the face of the said will, it was the case of an ambiguity affecting the instrument, capable of being explained by parole evidence, offered to prove by witnesses, that the testator's intention was, that the defendant, Thomas, should account as well for the $500, as for the value of the said slaves; which evidence the Judge refused to hear; and thereupon declared and decreed that the defendant, Thomas, in the division of the said residue, should be charged with, and account for, only the sum of $500, as for the value of the said slaves: from which decree the plaintiffs prayed an appeal to the Supreme Court, which his Honor was pleased to allow; and directed that

the foregoing statement should form the case for the consideration of the Supreme Court.

Battle, for the plaintiffs, referred to 2 Robert's on Wills, 22, 23; *Benson* v. *Whittam*, 2 Sim. Rep., 493, (2 Con. Eng. Ch. Rep., 515.)

Badger, for the defendant, submitted the case without argument.

GASTON, Judge. It seems to us that the words of the will do not admit of the interpretation contended for by the
(96) plaintiffs. In regard to his grandson Thomas, the testator says he "is to pay my executors five hundred dollars, *in full of all advancements* made to him or to his father." How is it possible, to hold consistently with this language, that he is to pay five hundred dollars *in addition* to the advancements made to his father?

It seems to us equally clear, that parole evidence is not admissible to shew that the testator's intent was at variance with his language. No rule of law is more clear than that a will is not to be expounded, much less contradicted, by parole evidence. It is incapable of being altered, detracted from, or added to, by parole. The case to which the counsel for the plaintiffs refers, (*Benson* v. *Whittam*, 2 Simons, 493; 2 Con. Eng. Ch. Rep., 515,) establishes no more than that parole evidence is admissible to ascertain whether the thing supposed to be given satisfies the description of it in the will. The object of such evidence is not to *expound* the will, but to *apply* its ascertained meaning to an external subject. This never can be done without evidence *dehors the will*. With regard to the evidence admissible in such cases, there are many nice distinctions, which it is wholly unnecessary now to consider. For, in the case before us, the testimony is offered to control the meaning of the will itself. We approve, therefore, entirely of the interlocutory decree, from which the appeal was taken.

PER CURIAM. Judgment affirmed.

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(97) EDWARD SAUNDERS *vs.* JOHN L. FERRILL.

1. The act of 1829, ch. 20, (1 Rev. Stat. ch. 37, sec. 25,) which enacts that no deed of trust or mortgage shall be valid to pass property, as against creditors, but from the registration thereof, embraces only those deeds in trust which are intended as securities for debts; and does not include deeds of settlement between husband and wife, in which the property is

conveyed to a trustee in trust for the wife—the deeds of the latter class being provided for, as to their registration, in the 29th section of the same Revised Statute.

2. Where the subscribing witness to any instrument, except a negotiable one, becomes interested in a suit brought by him, his handwriting may be proved to establish the execution of the instrument, whether his interest was thrown upon him by operation of law, or was acquired by his own voluntary act.

3. A post nuptial settlement, made between husband and wife, in which a greater interest in the property is secured to the wife than was provided for in the marriage articles, is void as against creditors, under the acts of 13 Eliz. and 1715 (1 Rev. Stat. ch. 50, sec. 1.)

4. A husband is incompetent to testify in favour of his wife; and will not, therefore, be admitted as a witness to establish a settlement in her favour against his creditors; nor will his subsequent declarations be admitted for that purpose.

5. No ante-nuptial agreement or transaction between husband and wife can be proved to support a settlement made after marriage, to the obstruction of the husband's creditors; for the act of 1785, Rev. ch. 238, (1 Rev. St., ch. 37, sec. 29, 30,) which requires "all marriage settlements, and other marriage contracts" to be registered within a particular time, to make them valid against creditors, must necessarily exclude all such contracts as in their nature do not admit of registration.

Upon a treaty of marriage, between Hector C. Homer and Eliza Savills, they entered into written articles, bearing date the 19th of June, 1837, whereby it was agreed, that all the estates, real and personal, of the intended wife, should be settled to her sole and separate use, during her life, with remainder after her death to the intended husband in absolute property. The marriage took effect shortly thereafter. The articles were attested by the present plaintiff alone; and were proved by his oath in August, and registered in September, 1837. On the 1st day of February, 1839, Mr. and Mrs. Homer united in a deed of settlement between themselves of the first part, and
(98) Edward Saunders, the present plaintiff, of the second part; in which, after a reference to the articles by their date, it is recited, that by the same he, the husband, covenanted that all the property, real and personal, then belonging to the said Eliza, should, after the marriage, be and remain her property during her natural life, and free from any claim, right or title of said Hector; and it is thereby witnessed, "that for the more effectually carrying the said agreement into execution, and for the purpose of providing for the said Eliza," they, the husband and wife, convey to the plaintiff, as trustee, in fee a tract of land, and also five slaves and other personal chattels, all of which had belonged to the wife, "in trust for the sole and separate use of the said Eliza, and at her sole and separate disposal;

with power to the said Eliza, by her last will, or any writing by her duly executed, to give away or dispose of any part or all of the said land, negroes and goods." This deed was executed by all the parties, and was proved in February, and registered on the 8th of March, 1839.

In the year 1838, the husband contracted debts, for which judgments were rendered; and executions issued, bearing teste before the 8th day of March, 1839, and were delivered to the defendant, the sheriff of Camden county, who seized some of the slaves conveyed by the settlement. The plaintiff then brought this action of DETINUE; which came on to be tried at Camden, on the last circuit, before his Honor Judge PEARSON, on the general issue.

After reading the deed to himself, the plaintiff proposed to give in evidence the articles of the 19th of June, 1837; and for the purpose of establishing the execution thereof, he offered witnesses to prove his own handwriting, as the subscribing witness. To that evidence the defendant objected; but it was received by the Court, and the articles were thus proved and read to the jury.

The defendant thereupon insisted, that the deed of settlement was void as against the creditors, notwithstanding the articles; inasmuch as by the settlement, the whole property is secured to the wife, and to be at her disposal, and by the articles she was to have only a life estate, and the remainder, in both the

(99) realty and personalty, was to enure to the husband.

And, thereupon, for the purpose of removing the ground of that objection, the plaintiff offered to prove by witnesses, that the said Hector did, before the marriage, verbally agree with the said Eliza, to settle upon her, absolutely, all her estates, including the negroes now sued for. To this evidence the defendant also objected; but it was admitted by the Court.

The plaintiff then further offered Hector C. Homer as a witness, to prove that he did make such an agreement with his intended wife as that last alleged; and that he purposely drew the said articles variant from the said verbal agreement; and fraudulently procured her to execute the same, without letting her know of the difference between them. To this evidence the defendant also objected; but it was received by the Court.

The plaintiff then further offered to prove by witnesses, the declarations of the said Hector C. Homer, to the same effect with the evidence by himself given as above; to which also the defendant objected; but the Court received it.

The counsel for the defendant then moved the Court to instruct the jury, that the deed to the plaintiff was void as against the creditors, because the executions were tested before the deed was registered; which instruction the Court refused to give. The jury found for the plaintiff; and from the judgment the defendant appealed.

Badger, for the defendant, contended that all the instructions of the Judge were wrong. He was wrong in saying that the plaintiff's handwriting might be proved. The general rule is, that the plaintiff cannot give in evidence his acts or declarations; and the only exception to the rule is, where the law casts an interest upon an instrumentary witness. Here the witness became a party voluntarily, and cannot prove his acts or declarations.

The husband's declarations were certainly not admissible to prove the settlement different from the agreement.

The deed of 1839 was void, as being fraudulent against his creditors. The property was vested in the husband, and the Judge allowed parole evidence to be given to show that the property was not to be in him. The deed was not
(100) registered, and of course could not defeat the creditors of the husband. If, then, the deed, if made, but not registered, would have been void as to creditors, much more is it void in this case. It is similar to cases of deeds in trust and mortgages. Could an alleged fraud in a mortgage defeat creditors? It will be void as to creditors, unless made and registered in proper time.

Homer and wife cannot set up the settlement in an action against the Sheriff. They must go into a Court of Equity, to have the true agreement established.

J. H. Bryan, for the plaintiff. The acts or declarations of a subscribing witness to an instrument, are always admissible, when he becomes a party; and that whether he becomes so voluntarily or by operation of law. Here the plaintiff is but a naked trustee, and had no interest when the declaration was made. The declaration of a party beneficially interested will be excluded; but if he were not so interested, it will be received. The declarations of Homer were admissible. See *Guy* v. *Hall*, 3 Murph. Rep., 150. And here the same facts were proved by a competent witness; and the verdict may be sustained upon his testimony.

Marriage is a gift of the wife's property to the husband. He is not a purchaser; and his creditors cannot set up a claim as

purchasers. Upon the question whether the settlement has any thing to sustain it against the husband, see *Lady Arundell* v. *Phipps*, 10 Ves., 139; Atherly on Mar. Set., 149, 155; *Shaw* v. *Jakeman*, 4 East. Rep., 201. An equitable right is a consideration at law. *Noblet* v. *Green*, 2 Dev. Rep., 517. In ascertaining a fraudulent intent, the situation of the parties is to be looked at; and whether there was an obligation, legal or equitable, see *Montacute* v. *Maxwell*, 1 Peer Wms., 618. If there were a parole agreement for a settlement, and, by fraud, it was not made, it might be established by parole; and it would stand upon a valuable consideration, and would be sustained as against creditors, if made before their liens commenced.

As to the lien of the execution before the registration, the act with regard to marriage settlements is different from (101) that in relation to mortgages and deeds in trust. See 1 Rev. Stat., ch. 37, sec. 23, 24, and 29, 30.

RUFFIN, Chief Justice, after stating the case as above, proceeded as follows: As the last point is unconnected with the others, it may be disposed of at once. From the terms of the exception we must take it, that the executions, though prior to the registration, were tested after the execution of the deed. The objection is, therefore, founded exclusively on the Revised Statute, ch. 37, sec. 24, (act of 1829, ch. 20;) which enacts that no deed of trust or mortgage shall be valid to pass property as against creditors, but from the registration. Our opinion is, that the act does not embrace every deed in which a trust happens to be declared; and that the instrument before us is not within it. The object was to give notice of encumbrances; and the "deed of trust" meant in the act, is that species, which though of recent origin, has grown into general use *as a security for debts*, in the nature of a mortgage with a power of sale. This results from the manner in which the two kinds of conveyance, "deed of trust" and "mortgage," are associated in that section of the act. But the special provision in the 29th section of the same act, as now digested in the Revised Statutes, for the probate and registration of marriage contracts, prevents the application to them of the general words of the 24th section. This particular species of "deed of trust" is to be governed by its own peculiar regulations. This exception is, therefore, unfounded.

Another exception, on the part of the defendant, as to the proof of the articles by testimony to the handwriting of the plaintiff as the subscribing witness thereto, we likewise deem to be unfounded. It was admitted at the bar, that the evidence

would have been proper, if the law had, after his attestation, thrown the interest on the plaintiff. But it was contended that, in a suit brought by the witness himself, the evidence is not competent, when the plaintiff acquires the interest by his own act. Were the question new, we should at least hesitate on it, as the distinction seems to have much reason in it; and, (102) indeed, with respect to endorsements to subscribing witnesses to negotiable instruments, it is established at law. *Hall* v. *Bynum*, 2 Hay. Rep., 329. But the rule seems to be confined to that particular case. The books contain many instances, in recent times, in which proof has been received of the handwriting, where the subscribing witness had become the administrator of the obligee, or the executor of the obligee; or where the obligee and witness had intermarried. From these cases, we cannot distinguish the present in principle; and, therefore, we think the articles well proved.

But the important consideration is, whether the articles, after they were established, are sufficient to sustain the settlement under which the plaintiff claims title? Upon that, the defendant's objection at the trial is unanswerable. Valid ante-nuptial contracts will undoubtedly support a settlement made after marriage in conformity to them. There are both a moral and an equitable obligation, which render the articles a good consideration for the settlement. But without such articles, a post-nuptial settlement is voluntary and void under the Stat. 13th Eliz., (see 1 Rev. Stat., ch. 50, sec. 1,) as has long been settled. So it necessarily must be, when by the settlement the husband secures to the wife or issue of the marriage more than by the articles he engaged. This settlement goes much beyond the articles, and deprives the husband of a valuable interest, which the articles not only left in him, but expressly secured to him. For that excess then, at the least, the deed to the plaintiff must be invalid; that is to say, if the case is to rest on the articles by themselves. But it thence follows, on a settled principle, that the settlement is not good even for the life of the wife. The deed is avoided by the act of 1715, or 13th Eliz., as being, at least in part, not founded on a valuable consideration, but voluntary. There is but one trust declared in this deed, and that is is favour of Mrs. Homer. In such a case the court cannot apportion the operation of the instrument to its considerations, and hold it in part bad, and in part good, as at common law; but must execute the stern condemnation of the statute, which says it shall be utterly void.

But the plaintiff asks to supply the defect in the articles
(103) in this respect, by the verbal agreement between the parties, and the alleged fraud by Homer on his intended wife. Although not necessary to the decision of the cause, yet, as the parties have raised the question in the record and in the argument, it is perhaps our duty to dispose, in the first place, of the objections as to the modes of proof on those points.

We have so lately had occasion to say, in a similar case, that husband and wife cannot be witnesses for each other, that we need now only refer to that decision. *Pearson* v. *Daniel*, 2 Dev. & Bat. Eq. Rep., 360.

Still less, if possible, are the husband's subsequent declarations competent against his creditors. They are not privies with him, but claim against, and not merely under, him. *Briley* v. *Cherry*, 2 Dev. Rep., 2.

The remaining part of the defendant's objection to the proposed evidence of the plaintiff, is to its insufficiency or irrelevancy. If the supposed parole agreement and fraud, though established, would not tend to sustain the deed, it is useless and illegal to hear the proof. Against the husband, or those claiming under him as volunteers, equity would set up such a parole agreement, unless it be specially required by statute to be in writing; as in England is the case by Stat. 29, Charles 2; and a fraud in obtaining from the woman the execution of an instrument, which purposely omitted a material part of the agreement, would doubtless be redressed, notwithstanding such a statute. But in respect of creditors, the act of 1785, Rev. ch. 238, (see 1 Rev. Stat., ch. 37, sec. 29, 30,) establishes, we think, a different and opposite principle. The effect of that act is to prevent any verbal agreement or transaction between the intended husband and wife, from obstructing a creditor. It is entitled "an act directing that marriage settlements and other marriage contracts shall be registered, *and for preventing injury to creditors.*" After reciting that marriage settlements and other marriage contracts have been frequently made and kept secret, whereby the possessors, upon the credit of the apparent property, have been enabled to contract great debts, to the manifest deception and injury of their creditors: For remedy whereof for the future, it is enacted, that all marriage settlements and
(104) other marriage contracts, whereby any estate shall be secured to the wife or husband, shall be proved and registered as therein mentioned; and all not so proved and registered, shall be void against creditors. This language shews

clearly an intention of the Legislature, that as to his creditors the vesting of the property of the wife in the husband, *jure mariti*, should not be prevented by *any secret* agreement, whether written or verbal. The secrecy of the agreement is the evil on which the preamble dwells, as tending to deceive creditors. The act designs to take from the parties all opportunity of practising such deception, and thus to "*prevent* injury to creditors," by giving to all such arragements that degree of publicity which can be derived from registration. The enactment, therefore, is, that if not proved within six months, and registered within one month thereafter, they shall be void. It is not sufficient that the settlement should be written and registered. That requires, as has been before mentioned, the support of the agreement before marriage; and the act requires *that* agreement, as well as the settlement, to be registered—using the words "*all* marriage settlements and *other* marriage *contracts*." We are to go back, therefore, to the first agreement; and if that be found defective, the post-nuptial settlement made in execution of it, cannot stand. The proposition is self-evident that those agreements must be in writing, because in that form alone do they admit of registration. And the law must be the same, when there is an attempt to vary a written and registered agreement by parole, to the prejudice of creditors. To allow it would amount to a repeal of the act. *Gregory* v. *Perkins*, 4 Dev. Rep., 50.

It is true, this shuts the door against correcting mistakes in drawing those instruments, and leaves an opening for practising frauds on confiding women. Generally, however, they have the advantage of friends and counsel in such treaties; and, therefore, there is no great danger of their being over-reached. But the answer is, that the Legislature must have been aware of those possibilities; and, being aware of them, thought they would so seldom occur as, practically, not to amount to a grievance, or, at least, to one at all comparable to those arising out of "the *frequent* secret contracts" between intended husbands and wives. Therefore, the act makes a registered, and, of course, a written instrument the only evidence against the husband's creditors that "any estate has been secured to the wife."

(105)

Our opinion therefore, is, that the deed to the plaintiff does not pass the title of the slaves to him, and that no evidence of the verbal agreement of fraud alleged ought to have been admitted. The remedy of Mrs. Homer is, upon the articles, in equity; where, for any thing now seen to the contrary, they will be specifically decreed in their present form.

PER CURIAM. 79 Judgment reversed.

(106) JOHN REYNOLDS *vs.* WILLIAM BOYD.

1. A Superior Court cannot entertain an appeal to revise the exercise of a discretionary power by an Inferior Court, when the decision of the latter is made as a matter of discretion; but if the decision were made as a matter of strict right, and upon the supposition that the inferior tribunal had no discretion, it will be reversed, and the inferior court ordered to proceed in the cause in the exercise of its sound discretion.

2. When the principal obligor in a bond given for his appearance at the County Court, to take the benefit of the act for the relief of insolvent debtors, is regularly called at court, and, failing to appear, judgment is rendered against him and his surety in the bond, the surety has no right *ex debito justiciæ*, to come in on a subsequent day of the term, and have the judgment set aside, in order to allow him to make a surrender of his principal. In such case, the court may, undoubtedly, in the exercise of a sound discretion, set aside the judgment and allow the surrender; but it is not obliged to do so, and ought not to do so, but upon good cause shewn, as that the party has a good defence, and was kept away by accident or misfortune.

The defendant was arrested under a *capias ad satisfaciendum*, and gave a bond with security, to make his appearance at the ensuing term of the County Court of Buncombe, to take the benefit of the act of 1822, (1 Rev. Stat., ch. 58, sec. 7,) for the relief of insolvent debtors. The *ca. sa.* and bond were duly returned to court, and, on Tuesday of the term, to which he was bound to appear, the defendant was called at the door of the court house; and, failing to appear, judgment was rendered against him and his surety on the bond. On Thursday of the term, the agent of the surety proposed to surrender the defendant, and have the judgment set aside. The plaintiff objected, on the ground that unless he could shew good cause for his absence, the surety had not the right to remain out of court until the latter part of the term; and, after the plaintiff had obtained judgment, then to surrender the defendant and vacate the judgment. The court were of opinion that, as the whole term was considered as one day, the surety was entitled to the whole term to make the surrender, without shewing why he had not appeared at the first of the term; and ordered that the surrender be recorded, and the judgment be rescinded. From this (107) judgment the plaintiff appealed to the Superior Court; and it was agreed that the question of law as to right of the surety, *ex debito justiciæ*, to surrender his principal at any time after the rendition of the judgment during the term, should be presented, upon the above statement of facts, without prejudice to either party on account of any discretion in the court below. In the Superior Court, his Honor Judge HALL was of opinion that the County Court erred in supposing that the surety

had a right, *ex debito justiciæ*, to have judgment set aside, to enable him to make a surrender of his principal; and ordered that opinion to be certified to the court below, with directions to proceed thereon. From this judgment the defendant appealed to the Supreme Court.

No counsel appeared for either party in this Court.

RUFFIN, Chief Justice. The Court has entertained some doubt whether this appeal was proper, inasmuch as the decision was on a point within the discretion of the inferior court. But we have supposed that we are bound to entertain it, since it is certain that the decision was not made in the exercise of the discretion of the court; but, on the contrary, upon the idea that the party was entitled to it *ex debito justiciæ*. It appears, affirmatively, that the County Court, so far from acting on its discretion, denied that it possessed any discretion in the matter; and gave its judgment under the notion that it had no discretion, but was obliged to make that decision, as a matter of strict right in the party. In that opinion that court was unquestionably wrong; and it is for the purpose of correcting that error, that we deem this a fit case for the interposition of the higher Courts.

Parties must be in court in apt time, and attend to their cases in their due order. Although the term is, to some purposes, but one day, by a legal fiction; yet that maxim has no reference to a question of this kind. It gives the same efficacy to all the proceedings of the term, by putting them on the same footing, whether they be transacted at an earlier or later hour or day. But it does not suppose that all the business is, or can be transacted at once, so as to authorise each suitor to postpone
(108) his case to the heel of the court. That would defeat the whole business of the court; for, if each suitor can claim to the last moment of the term, to make himself ready, no cause could be tried. Parties must come, not when they please, but when the court calls them. They have no right to stay away—much less *a right*, when they come, to have what the court has done set aside, without shewing any cause but their pleasure for so doing. The rules of practice, as to the order of doing business, are generally well understood by the officers and practitioners of each court; and their observance promotes the convenience of the court, the suitors and their counsel and attorneys, and prevents surprise. We believe that most of the courts have a fixed day in each term, for disposing of cases under the

act of 1822. But, whether it be so or not, whenever a judgment has been regularly taken, according to the course of the court, it is beyond the control of the party, except by appeal. He must apply to the court to set it aside upon good cause shewn; as that he has a good defence, and was kept away by accident or misfortune, and not by his fault. In that case the court, as an act of sound discretion, may, undoubtedly, set aside the judgment and hear the party *de novo*. But the court is not obliged to do so in every case, and ought not to do it in any, but upon cause shewn.

The County Court, therefore, erred in the opinion that the debtor and his surety *had a right* to have the judgment rescinded; and, consequently, erred in rescinding it on that ground. It must, therefore, be re-instated; and to that end, this opinion must be certified to the Superior Court, that a writ of *procedendo* may issue therefrom to the County Court to act accordingly.

PER CURIAM. Judgment affirmed.

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(109) *LYDIA CAMPBELL *vs.* JAMES STREET.

Where a testator, residing in Virginia where the law allowed masters to liberate their slaves by deed or will, bequeathed as follows: "My will and desire is, that my negro woman P. shall have her freedom immediately; and that all the rest of my black people shall serve until my youngest child shall be of the age of twenty-one years, for the use of raising my children and young negroes. After my youngest child is of age, my will is, that all my negroes shall be free:" *It was held* that the child of one of the negro women mentioned in the will, born after the testator, but before his youngest child came of age, was entitled to freedom after the latter event.

This was an action of TRESPASS VI ET ARMIS for false imprisonment—Pleas—the general issue—and specially that the plaintiff was the defendant's slave. Upon the trial at Person, on the Fall circuit of 1837, before his honor Judge SAUNDERS, the plaintiff produced the will of John Campbell, late of Nansemond county, Virginia; in which the testator bequeathed as follows: "My will and desire is, that my negro woman Pender should have her freedom immediately, and her emancipation recorded. My will and desire is, that all the rest of my black people should serve until my youngest child should be of the age of twenty-one, for the use of raising my children and young negroes. After my youngest child be of age, my will is that all my negroes should have their freedom and liberty." The

*This case was decided several terms ago, but by some inadvertence, was overlooked by the Reporters.

plaintiff then shewed that among the slaves mentioned in said will, was her mother, by name Bina, and that she, the plaintiff, was born after the testator's death, but before his youngest child, John Campbell, attained the age of twenty-one years, which last event was in the year 1815 or 1816; that from that time until 1833, she had passed as a free woman in Virginia; that she was then taken by the said John Campbell, Junior, and sold to James L. Overby, a co-partner in negro trading with the defendant. She then shewed that the defendant had held and controlled her as a slave ever since she was brought to Person county by the said Overby. The plaintiff also pro-
(110) duced a statute of the State of Virginia, enacted in the year 1782, allowing masters to liberate their slaves by deed or will.

The counsel for the defendant insisted, that as the plaintiff was born after the testator's death, and before his youngest child became of age, she was a slave. The case was submitted to the jury to find the facts, the construction of the will being reserved by the court. A verdict was returned for the plaintiff, and the court being of opinion with the plaintiff, rendered judgment upon the verdict, from which the defendant appealed.

Graham for the plaintiff.
J. T. Morehead for the defendant.

GASTON, Judge. The *intention* of the testator to extend the emancipation directed by his will to such of his negroes as should come into being before his youngest child should arrive at age, admits, we think, of no doubt. After directing that his negro woman Pender should have her liberty immediately, he proceeds thus: "my will and desire is, that all the rest of my black people should serve until my youngest child should be of the age of twenty-one, for the use of raising my children and young negroes—after my youngest child should be of age, my will is, that all my negroes should have their freedom and liberty." To ascertain his intention, it is not unimportant to consider that the declared motive for deferring emancipation, is the need of the services of the negroes as a fund for temporary purposes, and it is reasonable to infer, that he desired the emancipation to be as extensive and complete as was consistent with this necessity. But the language of the will is sufficiently explicit. The direction that "all the rest of my black people shall serve until my youngest child shall arrive at twenty-one," certainly

applies not only to those in being at his death, but such of their increase as should be born after his death, and before the child's arrival at age. As *these* became capable of labour, they were to form a part of the stock to be thus employed; and no doubt can be entertained of the duty of the executors under this clause, to appropriate that labour to the purposes directed. These
(111) are "for the use of raising my children and young negroes." As little doubt can be entertained that the young negroes born after the testator's death were *here* contemplated. These, in truth, were the most expensive, and most required the aid of this fund. If these then were embraced within the words "my black people" in the first part of the sentence, and also within the words "my young negroes" in the subsequent part of it referred to, they were certainly comprehended within the words "all my negroes," in the last part of the sentence.

The intention of the testator to emancipate being clear, the next enquiry is, whether he had authority to emancipate them. This, we think, must depend on his power over the original stock of which they are the increase. Wherever there is a capacity to dispose of any thing, unless there be some special restriction, there is a capacity to make the same disposition of its accruing profits. There is a difference, we understand, in the laws of the different States of this Union, upon the question what becomes of the increase of slaves under a limitation whereby a temporary ownership or use is granted to one, and the future and absolute dominion given over to another. With us, and as we believe in Virginia, and in most of the slave holding States, the increase are appurtenant to the stock, and go over with it to the remainderman—in others, they are regarded as profits, which, without a disposition to the contrary, belong to the temporary owner or usufructuary. But the laws of all permit a limitation to be made, which shall carry them, with the original stock, to the ultimate proprietor.

The law of Virginia allows emancipation by will; and it is conceded that the emancipation directed in this will, with respect to the original stock, is sanctioned by that law—either as an immediate emancipation with a condition of a short temporary service, or as an emancipation to take effect after that temporary service. If it be the former, the claim of the plaintiff to freedom is necessarily complete. But if it be the latter, then she claims freedom, not as her *birth-right*, but as a *gift*, from her

owner. She was in law his property, as an incident to,
(112) and fruit of, the property which he held in her mother—
and he, by law, had a right to emancipate *her* with her mother.

We have examined with attention all the Virginia decisions which have been referred to on both sides in the argument; but do not feel ourselves competent to remove the discrepancies between them, if such there be; or to deduce from them the full law on this subject. Of this, however, we are fully persuaded that, according to *all* of them, in a case where there is a plain declaration that the issue, as well as the original stock, shall be set free, it is as effectual to emancipate the increase, as to emancipate the parents. We see no error in the judgment rendered below. It must therefore be affirmed.

PER CURIAM. Judgment affirmed.

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(113) JAMES WILLIAMSON & CO. *vs.* WYATT CANADAY.

Where it appeared that A. B. and C. entered into a co-partnership in the name of A. & Co. for the purchase and sale of negroes, and it was afterwards agreed between them that A. and B. should alone be interested in the negroes purchased with cash, but all three should be equally interested in the negroes purchased on a credit, *it was held*, that though C. might be held responsible on all contracts by third persons dealing with the firm of A. & Co., yet that he would be competent as a witness to testify for the firm in an action on the warranty of soundness contained in a bill of sale for a negro purchased in the name of the firm for cash.

This was an action of ASSUMPSIT, brought on a warranty of the soundness of a negro slave named Ephraim, contained in a bill of sale purporting to have been executed by the defendant to James Williamson & Co.

Upon the trial, at Granville, on the last circuit, before his Honor Judge DICK, the plaintiffs, for the purpose of proving the handwriting of the subscribing witness, who lived out of the State, called as a witness one Edmund Towns, who was examined as to his interest in this suit; whereupon he stated, that some short time previous to the execution of the bill of sale in question, James Williamson, William Towns and witness entered into a co-partnership, under the name of James Williamson & Co., for the purpose of buying and selling negroes; that it was agreed that each member of the firm should advance the sum of five thousand dollars by a certain time; that witness failed to advance his part of the capital by the time agreed on; whereupon it was agreed by Williamson and William Towns, and

assented to by witness, that all the negroes purchased with cash, should belong exclusively to Williamson and William Towns, and that witness should have no interest in the negroes so purchased; but that in all the negroes purchased on credit, witness was to have an equal interest with Williamson and William Towns; that the boy Ephraim was purchased from the defendant with cash, and the witness had no interest in him; but that negroes were purchased on credit both before and afterwards, in which he did have an interest. Upon this statement, the defendant's counsel insisted that the witness was a
(114) member of the firm of James Williamson & Co. at the time when the aforesaid bill of sale was executed, and was therefore incompetent to prove its execution; of which opinion was his Honor; and the plaintiffs thereupon submitted to a judgment of nonsuit and appealed.

W. A. Graham for the plaintiffs.
Badger for the defendant.

RUFFIN, Chief Justice. The reason why the witness might be regarded as a member of the firm, is, that it might be deceptive on persons dealing with it, if he were not so to be treated. Here are two firms of the same name; the one consisting of two persons; and the other of those same two and a third; and both doing business, it may be said, at the same place. In a case in which the question involved the interest of third persons, and was, whether this witness was chargeable to third persons on all the contracts made in the name of such a firm, the reason just mentioned would seem to be decisive for holding him liable; and that, whether he had in fact an interest in the subject of the particular contract or not, since he professed to have such interest, and induced others to think he had. But, in the case before us, the question is different. A creditor is not seeking to charge this person with a debt, or any liability on behalf of the partnership. The negro the defendant sold was paid for; and this is a suit against the vendor by the partnership; and the question is merely as to the competency of the witness. That depends, not upon the principle that a creditor of the firm might treat him as one liable for the debt—for that might be done, though this man had no interest; but it depends on the enquiry, whether in fact and law the witness *has an interest* in the subject of this suit, and can be affected by the verdict and judgment. Now, upon that point, and in this stage of the case, the statement of the witness must be received by the court as true; and that statement

is, that, as between the parties themselves, this witness was not a partner in this purchase, and has no interest in the matter. Consequently, it seems clear that he is a competent
(115) witness; and his evidence must be left to the jury, who will judge of his credibility upon this point, as upon every other.

Judgment reversed and *venire de novo*.

PER CURIAM. Judgment reversed.

THE STATE *vs.* JAMES PLUNKET.

The 75th and 77th sections of the 34th chapter of the Revised Statutes, which, after prohibiting the selling of spirituous liquors to slaves, and making the offence indictable and punishable with fine or imprisonment, prescribes that, "if it shall appear on the trial that the defendant is a licensed retailer of spirituous liquors by the small measure, he shall also forfeit his retailer's license, and shall be incapable of taking a new license for the space of two years from and after the date of his conviction," mean that the defendant shall be a retailer at the time of the offence committed, and not at the time of the trial; and the fact of his being such retailer is not to be ascertained on affidavits or otherwise by the court, but must be averred in the indictment and confessed, or found to be true by the verdict of a jury.

The defendant was convicted in the Superior Court of Anson, on the last circuit, before his Honor Judge BAILEY, on an indictment, charging that he unlawfully sold spirituous liquors to a slave named George, the property of Martha Bogan, contrary to the form of the statute, in such case made and provided; and it appearing to his Honor, upon the testimony of a witness examined as to that fact, that the defendant was *then* a licensed retailer of spirituous liquors, it was adjudged by the court that the defendant be fined one dollar, and that he forfeit his license to retail spirituous liquors, and that he be incapable of taking a license to retail spirituous liquors for two years. From this sentence the defendant appealed to the Supreme Court.

Winston for the defendant.
The Attorney General for the State.

(116) GASTON, Judge, after stating the case as above, proceeded as follows: The 75th section of the 34th chapter of the Revised Statutes, respecting crimes and punishments, declares that every person who shall sell to a slave spirituous liquors, shall, for each offence, forfeit and pay the sum of one hundred dollars, to be recovered by warrant before a justice of the peace, and applied one half to the use of the party suing for the same, the other half to the use of the poor of the county. The 77th section of

the same chapter enacts that the offences mentioned in the 75th section shall moreover be indictable in the County or Superior Courts, and the defendant, on conviction, shall be fined or imprisoned at the discretion of the court, the fine, however, not to exceed fifty dollars, or the imprisonment three months; "and if it shall appear on the trial that the defendant is a licensed retailer of spirituous liquors by the small measure, he or she shall also forfeit his or her retailer's license, and shall be incapable of taking a new license for the space of two years from and after the date of his conviction."

The judgment which has been rendered in this case, seems therefore warranted by the *letter* of the act referred to—but we are of opinion that the literal sense does not present the true exposition of the intention of the law makers. In the first place, supposing that it was competent for the Legislature to make the degree of punishment of an offence depend not on the nature of the offence when committed, but on the quality and condition of the offender at the time of trial; and also to provide that the *facts* warranting this increased severity of punishment should not be passed on by the regular tribunal, the jury, but ascertained on affidavits or otherwise by the court—it will not be questioned but that such provisions are not in accordance with the general tenor of our usages and laws in criminal prosecutions. According to these the guilt of an act is fixed when the criminal act is done, and punishment is definitively assigned by law to criminal acts with reference to their guilt. According to these, every material fact warranting the punishment of an offender, is to be charged against him, and, if not admitted to be true, must be found true by the county before a court
(117) can award that punishment. Such a departure from the ordinary system of criminal jurisprudence is not lightly to be intended.

But the object of the Legislature in making this special enactment, would be, in a great measure, defeated, if the literal interpretation were to prevail. Licenses are granted annually. If one who sold spirits to a slave were not liable to the increased punishment unless he had a license in force *at the time of the trial*, a little delay would put it in the power of every offender to avoid this punishment.

The sound construction seems to us to be that the Legislature intended to make the criminal act more penal in the case of a retailer than of an ordinary individual. When the offence was committed by a retailer then, in addition to fine and imprison-

ment, he was to forfeit his license (if yet unexpired) and at all events to be rendered incapable for two years thereafter of obtaining another license. That the offence has been committed under these circumstances of aggravation must indeed "appear on the trial," but it is to appear in the ordinary way, by an averment thereof in the indictment, and a confession or finding that such averment is true. So much therefore of the judgment in this case as is in addition to the fine imposed on the defendant, seems to us erroneous.

This opinion is to be certified to the Superior Court of Anson, with directions to pronounce sentence on the defendant in conformity thereto.

PER CURIAM. Judgment to be reformed.

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(118) DUNCAN McRAE, Junior, *vs.* HENRY LILLY.

1. The Supreme Court cannot reverse a judgment of the Superior Court because of the alleged finding of excessive damages by the jury, or of the refusal of the Judge to set aside that finding—that not being a question of law, but of discretion.
2. When the Judge, after reciting all the testimony relating to a material enquiry of fact in the cause, asked the jury if they found in this testimony, or could lay their fingers on any part of it, shewing the fact, the question, unless proposed in such a tone and manner as to manifest the clear conviction of the enquirer how it ought to be answered, which will not be intended, is not an expression of opinion on the facts to the jury, but only very properly directs their attention to a material enquiry of fact.
3. In an action for seduction, the defendant cannot prove that his general character is *that* of a modest and retiring man—the general rule, to which this forms no exception, being, that unless the character of the party be put directly in issue by the nature of the proceeding, evidence of his character is not admissible.

This was an action of TRESPASS ON THE CASE, brought to recover of the defendant damages for the seduction of the plaintiff's daughter.

Upon the trial, at Cabarrus, on the last circuit, before his Honor Judge SETTLE, the plaintiff introduced as a witness his daughter, Regina, who testified that she was seduced by the defendant; and that, at the time of her seduction, she was living with her father, performing the usual and customary duties of a child in his family. The defendant then introduced several witnesses, with a view to shew that the plaintiff consented to, or connived at, the prostitution of his daughter; or that he was guilty of such gross negligence, in the care of her person, and

her moral instruction, as amounted to such connivance; to rebut which testimony the plaintiff also introduced several witnesses. The defendant then offered to prove that he was a man of good character, and of a modest and retiring disposition; which was objected to by the plaintiff, and rejected by the court.

His Honor instructed the jury that if they believed the testimony of his daughter, Regina, the plaintiff was entitled to recover; but if they could collect from the whole of
(119) the evidence, that the plaintiff consented to, or connived at, the prostitution of his daughter, he could not recover: or if he were guilty of gross negligence in the care of her person, or her moral instruction, that might be considered by them as connivance, and would destroy his right of action. His Honor recited the testimony, and asked the jury "if they found any, or could lay their fingers on any, portion of it which satisfied them that the plaintiff consented to, or connived at, the prostitution of his daughter, or was guilty of such gross negligence as amounted to a connivance." The jury returned a verdict for the plaintiff, and assessed his damages to $1,600. The defendant moved for a new trial:

1st. On the ground of excessive damages.

2nd. For the reason that the court expressed an opinion on the facts of the case.

3rd. Because the court rejected the testimony offered by the defendant, to shew his good character, and that he was a modest and retiring man.

His Honor overruled the motion for a new trial, and gave judgment for the plaintiff, from which the defendant appealed.

Barringer for the plaintiff.

Gaston, Judge. It is exceedingly clear that we cannot reverse the judgment below, because of the alleged finding of excessive damages by the jury, or of the refusal of the Judge to set aside that finding. Whether the damages be excessive or not, we have not the means of *examining*, because "between this Court and the evidence there is an impenetrable wall;" (see *Bank of Newbern* v. *Pugh*, 2 Hawks Rep., 392,) and if we had the means of examination, we have no right to *determine*, because this is not a question of law, but of discretion.

We cannot award a new trial because we think the Judge ought to have granted one. Our authority to reverse the judgment and award a new *venire*, is *only* because of some error of the court which infects the verdict.

Two of such errors are alleged. It is said that the Judge expressed an opinion to the jury on the facts of the case. In our opinion, this objection is not sustained. The only (120) part of his Honor's charge which can be pressed into the support of this objection, is *that* wherein, after having stated, as a principle of law, that if the plaintiff consented to, or connived at, the prostitution of his daughter, or was guilty of such gross negligence in the custody and education of his daughter as was equivalent to assent to her prostitution, he was not entitled to recover any damages; and, after reciting all the testimony, his Honor asked the jury if they found in this testimony, or could lay their fingers on any part of it, shewing that the plaintiff had so consented or connived, or been guilty of such gross neglect. Now, it is certain that this question might have been proposed in such a tone and manner as to manifest the clear conviction of the enquirer how it ought to be answered—but we cannot intend any circumstances of this sort; and without some peculiarity of tone or manner, intimating the opinion of the speaker, and influencing, or tending to influence, the judgment of those addressed, the question submitted very properly directed the attention of the jury to a material enquiry of fact.

It is also insisted that the Judge erred in rejecting the testimony offered by the defendant to shew that his general character was *that* of a modest and retiring man. We are satisfied that there was no error in rejecting the testimony proposed. In civil suits, the general rule is, that unless the character of the party be put directly in issue, by the nature of the proceeding, evidence of his character is not admissible. And no reason is seen why, in this case, there should be an exception to the general rule. The judgment is affirmed.

PER CURIAM. Judgment affirmed.

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(121) THE STATE *vs.* HORACE GIRGIN.

1. In an indictment under the 48th section of the 34th chapter of the Revised Statutes, an intent to disfigure is *prima facie* to be inferred from an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the accused of a different intent, or at least of the absence of the intent mentioned in the statute.

2. It is not necessary, in an indictment under this statute, to prove malice aforethought, or a preconceived intention to commit the maim.

3. To constitute a maim, under this statute, by biting off an ear, it is not necessary that the whole ear shall be bitten off—it is sufficient if a part only is taken off, provided enough is taken off to alter and impair the natural personal appearance, and, to ordinary observation, to render the person less comely.

The defendant was indicted at Washington, on the last circuit, before his Honor Judge PEARSON, for that he "unlawfully, & on purpose, did bite off the left ear of one James Watson, in the peace of the State then and there being, with intent to disfigure the said James Watson, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State." On the trial, it appeared in evidence, that the defendant and Watson engaged in a fight; and, after Watson had bitten the defendant's finger, the latter bit off a piece of Watson's ear, which, on inspection, appeared to be the segment of a circle about an inch along the rim of the ear, and about one-quarter of an inch deep in the gristle; and was about one-fifth part of the ear.

The defendant's counsel insisted, first, that the biting off part of the ear did not come within the statute. Secondly, that it was necessary for the State to prove malice aforethought, or a preconceived intention; and that the act was done with an intent to disfigure.

His Honor instructed the jury that it was not necessary that the whole of the ear should be taken off; it being sufficient if a part was taken off, provided such part was not merely the outside skin, but extended into the gristle, and was so large as to make it perceptible to any one that a part of the ear was gone; and that the part bit off of Watson's ear, as apparent to the court by inspection, was large enough to come within
(122) the meaning of the statute. He further instructed the jury that it was not necessary for the State to show malice aforethought, or a preconceived intention; and that the statute would include a case where it appeared that the idea of biting off the ear was not conceived until the fight commenced. And further, if the jury were satisfied that the defendant had bit off the part of the ear alleged, and that he did it on purpose, and not by accident, then the law implied that it was done with an intent to disfigure, upon the ground that a man is presumed to intend to do what he does do, unless the contrary is made to appear; that if they were satisfied that defendant bit off the ear after he got his finger out of Watson's mouth, with an intention to retaliate or revenge himself, he would be guilty and his counsel were mistaken in the position assumed by them, that the intent to retaliate rebutted the presumption of an intent to disfigure. The defendant was found guilty, and, after an ineffectual motion for a new trial, appealed.

Allen for the defendant.
The Attorney General for the State.

RUFFIN, Chief Justice. Both parts of the second objection taken for the prisoner, are in opposition to the cases of the *State* v. *Evans*, 1 Hay. Rep., 281, and of the *State* v. *Crawford*, 2 Dev. Rep., 425; which establish that the intent to disfigure is *prima facie* to be inferred from an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the accused of a different intent, or, at least, of the absence of the intent mentioned in the statute.

Since those cases, which were decided on the act of 1791, the law has been further altered in a manner which closes up all opening for the other branch of this objection. Under the act of 1791, it was contended, not without some plausibility, that, as to cases within the second section, the indictment must lay the acts to be of malice aforethought, as well as on purpose. We approve, indeed, of the contrary construction, which was adopted by the court in those cases. But, still it was a point that counsel could then argue with a serious face, and in a way, to which the Legislature seems to have feared the courts might, (123) at some time, incautiously yield, unless the statute should be rendered more explicit on that point. Hence, in revising the statutes, the opportunity was taken of placing the question beyond all cavil. In the "Act concerning Crimes and Punishments," 1 Rev. Stat., ch. 34, the 13th section relates to certain maims committed "of malice aforethought;" and then in the 48th section, it is enacted that "if any person shall, on purpose and unlawfully, but without malice aforethought, bite or cut off an ear," &c. It is thus seen that those words "*without malice aforethought*," which were not in the second section of the act of 1791, are introduced into the revised act of 1837—doubtless with the view of giving expressly to this latter act the same sense in which the former had been received by judicial construction. In other words, the Legislature approved of the interpretation adopted by the courts, and meant to incorporate it as a distinct and express enactment of the statute.

Upon the other point made on the trial, this court also agrees in the opinion given to the jury. The object of the Legislature was to protect individuals from such injuries as disfigure, that is to say, alter and impair the natural personal appearance. Where, therefore, the injury reaches that extent, the case must be within the meaning of the act. Here, such is the case. For, although the ear be not entirely severed from the head, yet, certainly,

enough was taken off to attract observation, and, to ordinary observation, to render the person less comely. In the opinion of this court, therefore, there is no error in the judgment.

PER CURIAM. Judgment to be affirmed.

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(124) ALFRED R. GASH *vs.* WILLIAM REES et al.

If, after a verdict for the plaintiff in the County Court, the court, upon motion of the defendant, order the costs of the attendance of some of his, the plaintiff's witnesses, to be taxed against him, and he appeals from such order, the appeal is proper, and the Superior Court cannot dismiss it upon the ground that the matter appealed from was one within the discretion of the County Court.

On the trial of this action, which was brought in the County Court of Buncombe, the plaintiff introduced five witnesses, all of whom were sworn, but only two of them were examined. After a verdict for the plaintiff, the defendant moved that he, the plaintiff, should be taxed with the costs of the attendance of the three witnesses who were not examined; which motion was allowed, and the costs of the said three witnesses were ordered to be taxed against the plaintiff accordingly; and he thereupon appealed from the order to the Superior Court; and on the last circuit, his Honor Judge HALL ordered the appeal to be dismissed, upon the ground that the matter appealed from was one within the discretion of the County Court; and the plaintiff thereupon appealed to the Supreme Court.

No counsel appeared for either party in this court.

DANIEL, Judge. The Superior Court dismissed the appeal, on the ground that it was a matter of discretion with the County Court, whether they would tax the tickets of the three witnesses against the plaintiff or against the defendant. We think this was not a ground for dismissing the appeal. The County Court was by law obliged to order the tickets of the three witnesses to be paid by some body, either by the defendant, who had been cast in the action, or, if illegally summoned, by the plaintiff who summoned them. They deemed it right to order the plaintiff to pay the said three witness tickets. The plaintiff was thereupon dissatisfied with the *order*, and appealed from it to the Superior Court; which, we think, he had a right to do. Whether the Superior Court ought to have affirmed the judgment of the County Court is another question, and not for considera-
(125) tion at this time. The act of Assembly declares "that when any person, either plaintiff or defendant, shall be

dissatisfied with the sentence, judgment, or decree of any County Court, he may appeal from such sentence, judgment, or decree, to the Superior Court of Law." 1 Rev. Stat., ch. 4, sec. 1. The appellant was a party plaintiff in the suit where the judgment was rendered against him as to this cost—he was interested—and the case says that he was dissatisfied. The law gave him a right to appeal, and the Judge erred in dismissing it. The judgment must be reversed. This opinion will be sent down, and the Superior Court will proceed to try the case on the appeal from the County Court.

PER CURIAM. Judgment reversed.

THE STATE *vs.* JOHN DAVIS.

1. An offer to strike by one person rushing upon another will be an assault, although the assailant be not near enough to reach his adversary, if the distance be such as to induce a man of ordinary firmness, under the accompanying circumstances, to believe that he will instantly receive a blow, unless he strikes in self-defence.
2. The acts and circumstances necessary to constitute an assault in law discussed and stated by his Honor Judge GASTON.

The defendant was indicted at Yancy, on the last Fall Circuit, before his Honor Judge PEARSON, for an assault and battery upon one William Roberts.

In support of the prosecution, a witness was called, who testified that he, Roberts and the defendant were crossing Coney mountain, on their return from a muster; that witness and the defendant were walking together, leading their horses down the mountain, and that Roberts was ten or fifteen steps ahead, on foot, with a rifle in his hand; that a quarrel commenced between the defendant and Roberts, when, upon Roberts using
(126) some insulting language to him, the defendant said to witness "hold my horse—I'll whip the rascal," and instantly dropped his bridle, and advanced towards Roberts, with his hands extended, as if to catch hold of him; but before he did so Roberts stepped on one side, struck him with his rifle, and knocked him down. The witness stated further, that the words "I'll whip the rascal," were spoken loud enough for Roberts to hear them; but he was unable to state how near the defendant was to Roberts when the latter struck him—he thought defendant was in about four feet; but would not say he was in *striking distance* of Roberts, or could have reached him with his arm. The defendant's counsel insisted, and moved the Court so to charge the jury, that "if defendant was not in striking dis-

tance, when he made the blow, he was not guilty of an assault." His Honor instructed the jury that an "assault was an offer or attempt to strike, under such circumstances as would induce a man of ordinary firmness to believe that he was instantly to receive a blow, and would justify his striking to prevent it. That if this were not so, the peace might be broken, and neither party be guilty—the one, because he struck in self defence; and the other, because his act did not amount to an assault. That, being in striking distance was a good general rule, but did not include all cases of assaults; that an offer to strike, at such a distance that any body could see the blow would not take effect, was not an assault; but if the distance were such as would induce a man of ordinary firmness, connecting it with the other circumstances, to believe that he would instantly receive a blow, unless he struck in self defence, the offer to strike would amount to an assault, although it should be proved that the assailant was not near enough to reach. That in this case, if the jury believed the witness, and were satisfied that the defendant had rushed upon Roberts and got so near that, under the circumstances, a man of ordinary firmness, would have believed that he was instantly to receive a blow, they would find the defendant guilty of the assault, although they were not satisfied that he had got quite near enough to reach him." The defendant was found guilty and appealed.

The Attorney General for the State

(127) GASTON, Judge. Upon the whole, we are of opinion, that there is no error in the Judge's charge.

An Assault is an intentional attempt, by violence, to do an injury to the person of another. It must be *intentional*—for, if it can be collected, notwithstanding appearances to the contrary, that there is not a *present* purpose to do an injury, there is no assault. Thus, where a man laid his hand on his sword and said "if it were not assize time, I would not take such language from you," the Court agreed that it was not an assault; for the declaration was that he would not assault him, the Judges being in town, and the intention as well as the act makes an assault. *Tuberville* v. *Savage*, 1 Mod. Rep., 3. And it must also amount to an *attempt*—for a purpose to commit violence, however fully indicated, if not accompanied by an effort to carry it into immediate execution, falls short of an actual assault. Therefore it is, that notwithstanding many ancient opinions to the contrary, it is now settled, that no words can, of themselves, amount to an

assault. 1 Hawk. C. 62 S. 1, page 110. And therefore, also it is said not to be an assault, if a man *strikes at* another at such a distance that he cannot reach him, or put him in fear. 2 Comyn's Bat. C. The distance is here explanatory of the *apparent attempt* to strike and shews that in truth, it is not an *attempt*—but only a *menace*—to do hurt to his person. It is difficult in practice, to draw the precise line which separates violence menaced from violence begun to be executed—for until the execution of it is begun, there can be no assault. We think, however, that where an unequivocal purpose of violence is accompanied by any *act*, which, if not stopped—or diverted—will be followed by personal injury—the execution of the purpose is then begun—the battery is *attempted*. Thus, riding after a person so as to compel him to run into a garden for shelter to avoid being beaten, has been adjudged to be an assault. *Morton* v. *Shopple*, 3 Car. & Payne, 373 (14 Eng. Com. Law Rep., 355.) So, in a late case, before a very eminent English Judge, it was held, that where the defendant was advancing in a threatening attitude, *with intent* to strike the plaintiff, so that his
(128) blow would, in a second or two, have reached the plaintiff, if he had not been stopped, although when stopped he was not near enough to strike, an assault was committed. *Stephen* v. *Myers*, 4 Car. & Payne, 349 (19 Eng. Com. Law Rep., 414.) In the case under consideration, the intent of the defendant to seize the prosecutor's person was not in question. The instruction prayed for, and the instruction given *necessarily* presupposes it. The instruction prayed for is, "that if defendant was not in *striking* distance, *when he made the blow*, he was not guilty of an assault," and the instruction given is, that an *offer* "*to strike*, at such a distance that any one could see *the blow* would not take effect, was not an assault"—but that "*the offer* to strike would be an assault, although the assailant was not near enough to reach, if the distance were such as to induce a man of ordinary firmness, under the accompanying circumstances, to believe that he would instantly receive a blow, unless he struck in self defence." "Rushing," with that intent, upon the prosecutor, and approaching, in execution of that intent, so near as to render it necessary for the prosecutor's safety to strike him down, amounts in law to an assault in the defendant.

PER CURIAM. Judgment to be affirmed.

(129) THE STATE *vs.* ROBERT JONES et al.

1. The 63d section of the 31st chapter of the Revised Statutes which prescribes the time when writs and other civil process shall issue and be made returnable, is inapplicable to, and was not intended to have any operation upon, the prerogative writ of *mandamus*. Such a writ can only issue when a necessity for it is shewn—and from its very nature it should issue, be made returnable and be returned, accordingly as the necessity that calls for it may require.
2. No general rules of practice in relation to the issuing and return of writs of *mandamus* have yet been prescribed in this State; and it is therefore in each case the province of the court by which the writ may be awarded to fix the day on which it should be made returnable.
3. *The case* set forth in the writ of *mandamus must shew* that there is no other specific legal remedy, because the court will not, ordinarily at least, interfere by *mandamus* when there is another specific legal remedy. But it is not proper—much less necessary—that the writ should *declare* that there is no other remedy for the mischief which it commands to be removed.
4. The writ of *mandamus* should be directed to all the persons, whose duty it is to perform the act required, though some of them may be applicants for the writ. And where three of seven commissioners filed a petition for a *mandamus* to compel the other four in concurrence with them to perform a specific duty, and an alternative *mandamus* was issued directed to the four only, which was returned with an admission of service by the three petitioners, and an expression of their readiness to perform the duty, whereupon a peremptory *mandamus* was ordered; *it was held* that the order for the peremptory *mandamus* was against all, and that the proceedings were sufficient.
5. When an alternative *mandamus* is issued, and no answer, or return of cause is made, the court may be moved for an attachment against the person to whom it has been directed; and in such a motion the attachment ought to be refused, unless there has been a personal service of the writ or such a service as the court, by special order under the circumstances of the case, may direct. But the court, instead of proceeding by attachment for contempt because cause is not shewn, may direct a peremptory *mandamus* to issue—simply regarding the alternative *mandamus* as in the nature of a rule, to shew cause why an absolute *mandamus* should not issue; and to justify this course personal service of the rule, or the writ in nature of a rule, is not necessary; but service by leaving a copy at the dwelling house is sufficient, if the court deem it reasonable; and of this, the court which issues the rule, or writ in nature of a rule, is the exclusive judge, and its judgment upon that matter cannot be revised upon appeal.

(130) The dispute respecting the seat of justice of the county of Henderson, which was before the Supreme Court at the last term, (See *State* v. *King et al.*, 4 Dev. & Bat., 521,) was in this case again presented for consideration. After dismission of the *mandamus*, which had been directed to the commissioners appointed by the County Court to lay off and sell the lots in the town supposed to have been established, a petition was filed in the Superior Court of Buncombe, on the last circuit, before his

Honor Judge HALL, by Benjamin Wilson, Epaphroditus Hightower, and John Clayton, three of the seven commissioners authorised and directed by the act of Assembly, to procure, by purchase or donation, a proper tract of land for the county town, setting forth that the commissioners, whose duty it was to determine the site for the town, had fixed it on Shaw's Creek, near Hugh Johnston's house; that the petitioners were anxious to proceed to the performance of the duty enjoined by the law on the commissioners of the second part, the procuring, by purchase or donation, for the use of the county, of a tract of land at the determined site; but that Robert Jones, Asa Edney, John Miller, and Richard Allen, the other four of these commissioners, without whose co-operation the petitioners could not act, utterly refused to join with the petitioners in the performance of this duty; and praying that a *mandamus* might be directed *to the commissioners of the second part*, commanding them to perform the duty required by the said act; and that the said Robert Jones, Asa Edney, John Miller, and Richard Allen, might be required, in connection with the petitioners, the commissioners of the second part, forthwith to proceed to purchase or receive, by donation, and take the deed for said land, as by the act is directed. Upon this petition, verified by affidavit, an order was made on Tuesday, the 2d day of the term, that notice should issue "to the defendants, Jones and others," returnable on Saturday next, to shew cause why a *mandamus* should not issue against them, compelling them to perform the duties in said petition mentioned. A notice of this order thereupon issued, addressed to *all* the commissioners, returnable as aforesaid. The petitioners appeared and acknowledged service of the notice; and the sheriff
(131) made return that he had executed the same, by leaving a copy thereof at the dwelling houses of John Miller, Robert Jones, and Richard Allen, and by delivering a copy to Asa Edney. It appears, that on the return day of the rule or notice, an objection was made, but the record does not shew by whom, that personal service of the rule or notice ought to have been given. No cause was shewn against the *mandamus* prayed for; and the Court thereupon ordered that an alternative *mandamus* should issue, returnable on the Saturday following, the last day of the term. A writ thereupon issued, addressed to Edney, Allen, Miller and Jones, reciting the substance of the acts of Assembly, in relation to the seat of justice of the county of Henderson; the doings of the commissioners of the first part, determining the site of it; the duty of the seven commissioners,

all of whom were named, to procure, by donation or purchase, a proper tract of land therefor; the allegation of three of the commissioners that *they* had always been willing to discharge this duty, and had requested the other four to join with them in so doing, and that *these* had refused to comply with said request; and commanding the said Edney, Allen, Jones and Miller, to join with Wilson, Hightower and Clayton, in the performance of the duty enjoined by the act—or signify cause to the contrary thereof. The sheriff returned this writ, with an indorsation that he had "executed" the same, "by tacking a copy of it on the door of John Miller's house, by leaving a copy at Asa Edney's dwelling house, Robert Jone's dwelling house, and the dwelling house of Richard Allen;" and John Clayton, Benjamin Wilson and E. Hightower endorsed thereon "that they admit service of the alternative *mandamus*, and answer that they are willing to proceed without further notice." No answer to the alternative *mandamus* was made, nor cause shewn against the peremptory *mandamus*, by any of the commissioners; but Miller, one of them, appeared in court, and took several exceptions, and made sundry objections to the proceedings, which appear of record. He moved to supersede the *mandamus* which had issued, because it should have been issued ten days before the return day or because there should have been at least eight (instead of seven) days
(132) between the *teste* and the return of the writ—because the writ did not state enough to support it; for "it omitted to set forth that there was no other remedy but this writ"—and for that it was directed improperly to four of the commissioners, when it ought to have been directed to the whole seven. It was also insisted, by the defendant, Miller, that the writ ought to have been served on the other *three*, before there could be any final action thereon; that it ought to have been delivered to them personally; that leaving a copy at their houses of a writ returnable in so short a time, was not a sufficient notice, as there was no reason to believe that Allen had been in the State from the day the first notice issued until the return day of the writ, nor any evidence to shew that the defendants had gone out of the way to avoid service, or had been in the county from the issuing of the writ until its return; that there ought, at least, to have been an affidavit of service, to justify any action of the court upon the writ; and that, in fact, the writ had not been served. The court over-ruled these exceptions, and adjudged that sufficient notice had been given of the writ. A peremptory *mandamus*

was awarded; and, from this, the record states that the defendants appealed to the Supreme Court.

Battle for the defendants.

The Attorney General for the State.

GASTON, Judge, after stating the case as above, proceeded as follows: All the exceptions and objections taken below to the alternative *mandamus*, have been urged here in the argument for the defendants. In support of the objection that the writ is illegal, and ought to be quashed, because it did not issue at least ten days before the day on which it was made returnable, the counsel for the defendants relies on the 63rd section of the act "concerning Courts of Justice, Practice, Pleas and Process," 1 Rev. Stat., ch. 31. By this it is enacted, that all writs and other civil process, (except subpœnas returnable immediately,) shall be returned the first day of the term to which they may be returnable, and be executed at least ten days before the beginning of the term, when returnable to a Superior Court,

(133) or five days, when returnable to a County Court—and it is further enacted, that if any original or mesne process shall be taken out within the time above specified, before the beginning of the term of a Court, it shall be made returnable to the term next thereafter. All process made returnable at any other term, or executed at any other time, or in any other manner, than is thus prescribed is to be adjudged void on the plea of the defendant. The writ before us does not fall within the *letter* of this section. It was taken out—or rather *issued* during term time, and not before the beginning of the term. But it is manifest, we think, that the provisions of this section are inapplicable to, and were not intended to have any operation upon, the prerogative writ of *mandamus*. Their operation is confined to writs and process used to commence, or in course of prosecution of, ordinary actions for the assertion of private rights or the redress of private wrongs, "taken out" by the parties from the officers of the Court, without any special order of the Court. The *mandamus* is an extraordinary remedy—never issuing but by the express order of the Court, whose high prerogative it is, when no other adequate remedy can be found, and there would otherwise be a failure of justice, or defect of police, thereby to compel inferior courts, corporations or persons, to perform some specific and known duty. Such a writ can only issue when a necessity for it is shewn—and from its very nature it should issue, be made returnable, and be returned, accordingly as the necessity that calls for it may require.

In England these writs are not infrequent; and with a view to uniformity of practice, the courts there have laid down some *general rules*. Amongst these we find it stated in an *anonymous case*, 2 Salk. Rep., 434, that the court on the first day of that term made a rule, that if the corporation to which a *mandamus* was sent was more than forty miles from London, there should be *fifteen*—or, as the rule is more accurately recited in *Rex* v. *Dover*, 2 Stra. Rep., 407, *fourteen*—days between the *teste* and return of the first writ; but if but forty miles or under, eight days only. Whether this rule has been applied to any other cases than those involving disputes about corporate
(134) offices, franchises and duties, it is unnecessary to enquire, as it cannot for a moment be doubted but that on a proper case shewn the court would make a *special order* for the return of any *mandamus* which it might command to be issued. With us the *mandamus* is scarcely known in practice. Until this controversy, our books of reports furnish us but with two instances in which such a writ has been awarded. *Delacy* v. *Neuse River Navigation Co.*, 2 Hawks Rep., 274; *State on the relation of Dickens* v. *Justices of Person*, 4 Dev. Rep., 406. No general rules of practice have yet been prescribed in relation to them; and therefore in each case it is the province of the court by which the writ may be awarded to fix the day on which it should be made returnable.

Nor is it proper—much less necessary—that the writ should declare that there is no other remedy for the mischief which it commands to be removed. The court indeed will not, ordinarily at least, interfere by *mandamus* when there is another specific legal remedy—and it is therefore a good cause for quashing a *mandamus* that *the case* set forth in it does not call for this extraordinary interposition. Thus in the case of the *King* v. *Margate Pier Company*, 3 Barn. & Ald., 220, (5 Eng. Com. Law Rep., 266) a writ of mandamus to a corporation commanding them to pay a poor's rate was quashed, because it did not state that the corporation had no effects upon which a distress could be levied. The remedy by distress was the regular, ordinary, and in general, adequate remedy; and if there existed any fact which rendered the use of it impracticable or insufficient, and therefore warranted a resort to the extraordinary remedy of *mandamus, that fact* should be averred in the writ distinctly, so as to put it in the power of the defendants to traverse such fact in their answer. Upon examining the precedents, it will be found

that writs of *mandamus* contain no recital that another remedy is not to be had, but only the desire "that due and speedy justice should be done in that behalf." 6 Wentw. Plead., 305 to 356. Indeed, if the case set forth in the writ be one in which there is no other specific remedy—*cui bono* is this conclusion of law to be stated? Do not the court know it? All that is wanted to warrant and demand their interposition
(135) is a verified statement of the necessary facts. It is their duty to know the law arising on the facts.

The objection that the writ should have been *directed* to all the commissioners, whose duty it was to perform the act required, has been strongly pressed upon us; and, to show that such is the regular course of proceeding, a case has been quoted from 2 Chitty's Reports, 254, where, on an application for a *mandamus* against one of the churchwardens of a parish, to concur in a rate with the overseers, it was said, by the court, "you must take the *mandamus* against the whole of the parish officers, against yourselves as well as the other overseer—it has often been so done." We admit fully the correctness of the doctrine contended for by the defendants, and yet hold that their objection is not sustained. The writ might indeed have been more *formally* directed to each and every of the seven commissioners, but upon this record it must be held that it was so directed. The *mandamus* prayed for in the petition is a *mandamus directed to all*. The petitioners, three of the commissioners, admit service of the *mandamus*, and declare that they are ready to act. A writ is then *addressed* to the other four only, because their colleagues have accepted service, and the act which the four are ordered to do, or shew cause to the contrary thereof, is an act in company with their colleagues, and in which their colleagues are by virtue of their express assent of record bound to join under the penalty of a contempt. The three petitioning commissioners who acknowledge service of the alternative *mandamus* declare that they have no cause to shew wherefore the act ordered should not be done. And if the others, to whom an opportunity is thus afforded of shewing cause, offer none, then *all* having been *directed* to do the act, or signify wherefore they do not, the peremptory *mandamus* properly issues against *all* as prayed for.

The remaining exceptions and objections present the enquiry, whether there was error in the court below adjudging that service had been made of the *mandamus* upon Edney, Jones and Allen? It is one of the first principles of natural justice, one

which seldom is, and never ought to be, lost sight of in
(136) municipal law, that no man should be condemned unheard; and in furtherance of this principle, process, or notice in the nature of process, almost invariably issues, to summon, warn, or compel a party to appear in court, and hear the complaint against him, or shew cause, if any he has, against that complaint, before any adjudication is made. In general, the form of this process or notice, as well as the manner of its service, is positively prescribed by law; but, in many cases, *these* must necessarily be left to the sound sense and discretion of the Courts of Justice—bound, as they must always feel themselves to be, to keep steadily in view the great principle above stated. As to the manner of serving notices of the nature of that before us, we have nothing more explicit in our legislation than is to be found in the act "concerning Courts of Justice," 1 Rev. Stat., ch. 31, sec. 126, 127. These make it the duty of the sheriff to serve all notices which are required to be given, in the course of any cause, motion or proceeding, either at law or in equity, "by delivering a true copy of the same to the person to whom it shall be directed (if to be found in his county), *or* by leaving a copy thereof at the usual place of abode of such person, if in his county;" and make the sheriff's return evidence of service, in the manner and at the time stated in such return. This act removes the difficulty started because of the want of an affidavit of service; but it leaves open the question, when is the personal service necessary; and when will a service, by leaving a copy at the dwelling house, be sufficient? For the determination of this question, where the law is silent, it seems to us the true criterion in general is—for what object is the service of process intended to bring the party into contempt, by founding thereon a motion against him for attachment? If it be, the service must be personal, if possible; but if personal service be not possible, and there is probable cause to suspect that the party keeps out of the way to avoid it, the court may make an order that leaving notice at the dwelling house shall be sufficient. If, however, the service is not to be made the groundwork of a proceeding to punish, but is relied on merely to assure the court that a fair opportunity has been afforded for objecting against a
(137) rule or proceeding, *prima facie* just, there personal service is not necessary, and the other species of service, if the court deem it reasonable, is in law sufficient. See 1 Tidd's Prac., 2d Am. from 8th Lon. Ed., 505; *Weston* v. *Falkner*, 2 Price Rep., 2—same 4; *King* v. *Smithers*, 3 Term Rep., 351;

King v. *Edgrean*, *ibid.*, 352. When no answer or return of cause is made to an alternative *mandamus*, the court may be moved for an attachment against the persons to whom it has been directed. And, in such a motion, we think the attachment ought to be refused, unless there has been a personal service of the writ, or such a service as the court, by secial order, under the circumstances of the case, may direct. But the court, instead of proceeding by attachment for contempt, because cause is not shewn, may direct a peremptory *mandamus* to issue—simply regarding the alternative *mandamus* as in the nature of a rule to shew cause why an absolute *mandamus* should not be issued. See *People on relation of Temper* v. *Judges of Ulster*, 1 John. Rep., 64. And, to justify this course, personal service of the rule, or the writ in nature of a rule, is not necessary, for the award of the peremptory *mandamus* operates, not in the nature of punishment, but as a command to execute an ascertained duty.

Having arrived at this conclusion, we think it necessarily follows, that it was within the exclusive province of the court below to determine whether the actual service was a reasonable service or not. It is not for us, therefore, to revise the judgment which the court formed upon that subject. It may be permitted for us, however, to say, that his Honor was called upon, by the plainest and strongest considerations of duty, not to lend a favorable ear to any objections on this score, which were not of a very substantial kind. It is not to be concealed that the dispute in this case—as well as the dispute in the case before us at the last term—is, in truth, a contest between two parties, which have distracted the county of Henderson, upon the question where the county town shall be fixed, and the public buildings erected. Public order—the dignity of the laws—the decorous administration of justice—demand that this controversy should be settled as speedily as the *right* of the matter can be
(138) ascertained, and judicial forms will permit. In truth, that right had been ascertained—deliberately ascertained—in the case of *King and others*, where the merits of the controversy were passed upon in the Superior Court, and afterwards re-asserted in this court upon appeal. It could not be doubted but that this decision was quickly and generally promulgated throughout the county of Henderson; and that the party which had failed upon the merits, well knew that if they continued further resistance, the adverse party would unquestionably move for the precise remedy now sought for. When, therefore, upon this motion being made, it was seen that but one of the recusant

commissioners could be found, on whom to serve notice of the motion—that when he appeared in court, instead of shewing cause against the writ moved for, he interposed formal objections only for the purpose of delay—that when the writ did issue, *none* of these commissioners could be found, and he who had before appeared, gave way to another, who, instead of putting in any answer to the writ, sought, by every astute exception and technical objection, to embarrass and protract the proceedings—that no affidavit was offered shewing why further delay was necessary for any purpose of individual or public right; nor accounting for the sudden disappearance from home of all the resisting commissioners; nor furnishing any reason for the court to doubt that in truth every one of them was fully aware of the proceeding, and that all were concurring in the opposition ostensibly conducted by one only of their body—under these circumstances, whatever form of notice the law would *permit* to answer for the purpose of administering justice, the minister of the law was justified in holding to be *sufficient* notice.

The judgment of the Superior Court is to be affirmed.

PER CURIAM. Judgment to be affirmed.

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(139) ANDREW FALLS et al. *vs.* ABNER MCAFFEE et al.

1. Where the condition of an injunction bond is, that the complainants "shall well and truly indemnify the obligees for all damages they may *sustain* by wrongfully suing out the injunction," it will not be necessary for the obligees, upon a dissolution of the injunction, to bring an action on the case to ascertain the damages sustained by them before suing upon the bond.

2. In a suit at law, upon an injunction bond, it is not necessary for the obligee to state in his declaration, or prove upon the trial, an order of the Court of Equity allowing the withdrawal of the bond, and permitting a suit to be brought upon it.

This was an action of DEBT, upon a bond given by the present defendants, upon obtaining an injunction in Equity. The condition was, that the complainants should "well and truly indemnify" the defendants in equity "for all damages they might sustain, by reason of the wrongful suing out said injunction."

Upon the trial, at Lincoln, on the last circuit, before his Honor Judge SETTLE, it appeared that the injunction had been dissolved; but it was objected, by the defendants, that the plaintiffs could not recover, without shewing an order of the Court of Equity, allowing the withdrawal of the bond from that

Court, and permiting a suit to be brought upon it. Secondly, that an action of debt would not lie against the principals in the injunction bond, until the damages sustained by reason of suing out the injunction had been ascertained in an action on the case. The Court intimated an opinion against the plaintiffs upon both points; in submission to which they suffered a nonsuit and appealed.

Badger for the plaintiffs.
W. J. Alexander for the defendants.

RUFFIN, Chief Justice. The Court entertains an opinion different from that of his Honor, upon both of the points made at the trial.

There was no necessity for another action to ascertain the plaintiffs' damages, before bringing debt on the bond, as the words of the condition are, if the obligors "shall well and truly indemnify" the obligees "for all damages they may
(140) *sustain* by wrongfully suing out said injunction." The language of the contract, therefore, plainly authorises this action in the first instance. This case is not like that of *Davis* v. *Gully*, 2 Dev. & Bat. Rep., 360, in which the condition of the bond was for the payment of "such damages as shall be *recovered*" of the complainants in equity. The decision turned on the word "recovered" as contrasted with "sustained," as is stated in the very beginning of the opinion. The present case, therefore, falls within the distinction there expressed, according to which, this action will well lie to recover such damages, if any, as the obligees may be able to shew they did sustain.

As to the other point, it is clear that is between the obligees and the Court of Equity; and that the Court of Law can take no notice of the means by which the obligees obtained possession of the bond. It is the ordinary case of an action of debt on a bond with collateral condition, by the obligees against the obligors; and the declaration need contain no averment of leave to bring the action being given by the Court of Equity; and, consequently, it need not be proved. The declaration must, no doubt, state such proceedings in the suit in Equity as put an end to the injunction and no longer left it in force; but it need not set out an order to deliver the bond to the obligees. It is sufficient for the Court of Law, that the plaintiff there has the bond, of which he makes profert. Judgment reversed and *venire de novo*.

PER CURIAM. Judgment reversed.

(141) THOMAS McNEELY *vs.* ARCHIBALD G. CARTER.

Where a contract was made for the sale of a lot of cotton, in which it was agreed as follows: "The price to be fixed on in the following manner—The seller is to select either Fayetteville, Cheraw, or Camden, and to name a time, and the prices are to be regulated by the prices at the named market, and time—the price to be the same as good crops of cotton sell for at the time. The price to be fixed upon by the 1st of June next:" *It was held* that by a just construction of the contract the seller was to name beforehand a market and a day by which the price was to be regulated, and that he could not, on the last day allowed him, name a market and a preceding day for that purpose.

This was an action of ASSUMPSIT for money had and received for amount overpaid in the purchase of a lot of cotton. The defendant pleaded the *general issue*, and the only question in the case arose upon the construction of the following agreement, to-wit:

"A. G. Carter agrees to sell his crop of cotton to Thomas McNeely, and to deliver the same picked and unpacked at McNeely's factory; and McNeely agrees to pay Carter one thousand dollars down, and the balance in three, six and nine months, equal payments, with interest from the time the cotton shall be delivered. The price of the cotton to be fixed on in the following manner: said Carter is to select either Fayetteville, Cheraw or Camden, and to name a time; and the prices are to be regulated by the prices at the named market and time. The price to be the same as good crops of cotton sell for at the time—and fifty cents to be deducted for hauling per hundred pounds in all cases. The price to be fixed upon by the 1st June next. This 25th January, 1837.

(Signed) THOMAS McNEELY,
A. G. CARTER."

It appeared upon the trial at Davie, on the last circuit, before his Honor Judge SETTLE, that a part of the cotton was delivered on the day the agreement was made, and one thousand dollars was then paid; and the balance of the cotton was delivered between that time and the 26th of April following:
(142) That on the 31st of May ensuing the defendant notified the plaintiff that he selected Camden as the place, and the 31st day of January preceding as the time, by which the price of the cotton should be regulated. The plaintiff contended, that according to the true construction of the agreement, the defendant had no right, on the 31st of May, to go back to the 31st day of January preceding, as the day that should regulate the price of the cotton.

His Honor instructed the jury "that the defendant had a right to go back to any day after the contract was entered into, and claim the price for which cotton was selling in Camden on that day." The jury returned a verdict for the defendant, and the plaintiff appealed.

Badger for the plaintiff.

Gaston, Judge. It must be admitted that the contract to be expounded has not been expressed in very perspicuous language, nor can we be sure that any exposition which may be given of it will be free from error. But in our judgment, the meaning assigned to it in the court below is not the correct one.

According to that interpretation, the contract substantially is to allow the highest price which cotton may bear at either of the three named markets on any day between the execution of the contract and the first of June thereafter. Now an obvious—and very strong—objection to this interpretation is, that had the parties so meant, nothing was easier or more natural than to have said so. It can scarcely be conceived, that if this had been the object of the bargain, so roundabout a mode of declaring their meaning, or of providing for the execution of it, would have been resorted to.

The next objection to this interpretation is, that it makes the bargain *unequal*, which, in the absence of plain stipulations to that purpose, it will not be presumed to be. If the defendant, in selecting a day and a market for fixing the price of the cotton can act retrospectively, he *must* gain, and the plaintiff *must* lose, by the selection. Of course he will name the day and the place when and where the price was highest.

(143) Finally; we think this advantage on the part of the defendant cannot fairly be inferred from the language of the instrument. All is fixed by the contract at the time of its execution, except the price; and the language used in regard to this, seems altogether *prospective* in its character. "The price to be fixed in the following manner." "The said Carter is *to select* either Fayetteville, Cheraw or Camden, and *to name* a time, and the prices are *to be regulated* by the prices at the named market and time." "The price *to be* the same as good crops of cotton sell for at the time." The just inference from this seems to be, that Mr. Carter was to name beforehand a market and a day by which the price was to be regulated.

Entertaining this opinion, we hold that the jury was misdirected, and that there ought to be a new trial. The judgment therefore must be reversed, and a *venire de novo* awarded.

Per Curiam. Judgment reversed.

JOHN HARDIN *vs.* JOHN BORDERS et al.

Before an action can be sustained for a malicious prosecution or arrest, it must appear that the prosecution was legally determined; and if there be no evidence of the fact, it is not error in the Court to refuse to leave it to the jury to find whether or not the prosecution was determined.

This was an action on the CASE for a malicious prosecution, tried at Rutherford, on the last circuit, before his Honor Judge HALL.

It appeared, upon the trial, that the plaintiff was arrested and taken before two justices of the peace, under a State's Warrant, which charged him with feloniously stealing a negro man named John, the property of the prosecutor; that the two justices heard the case, and *adjudged* the plaintiff to be guilty of the charge—issued a *mittimus*, and placed him in the custody of the
(144) officer to be carried to jail; that the plaintiff then broke custody, and it did not appear that he had ever been legally discharged from the prosecution for the said felony, by the magistrates or by proclamation in open court, or by the verdict of a jury and order of court, although the papers in the cause were all returned to court. His Honor being of opinion that the plaintiff had failed to shew a legal discharge from the prosecution for the felony, he was nonsuited; and afterwards moved to set aside the nonsuit, and to have a new trial granted, upon the ground that the court had erred in the matter of law, and that it ought to have been left to the jury to decide whether the plaintiff had been discharged by the magistrates or not. This motion was overruled, and the plaintiff appealed.

No counsel appeared for either party in this Court.

DANIEL, Judge, after stating the case as above, proceeded as follows: There was no evidence in the case to be left to the jury that the justices had discharged the plaintiff; but the evidence was directly the other way, that they had convicted him, and committed him to jail. Before the plaintiff could support his action for a malicious prosecution or arrest, it must appear that the prosecution was legally determined. *Hunter* v. *French*, Will's Rep., 517; *Morgan* v. *Hughs*, 2 Term Rep., 225; *Fisher* v. *Bristow*, Doug. Rep., 215. In this case, the plaintiff did not shew any legal determination of the proceedings on said warrant. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

(145) DAVID LEWIS, Adm'r of DAVID W. and JOHN KEMP, *vs.* DAVID SMITH, Ex'r of WILLIAM KEMP.

1. Where a testator bequeathed certain slaves to one for life, and then over to another person, and the legatee for life, without any renunciation of record by the executors named in the will, obtained letters of administration with the will annexed, upon the estate, and took possession of the slaves, and retained them for more than thirty years, until his death, *it was held*, that the jury might infer an assent of the executors, or make any other reasonable presumption of fact, to uphold the right of the legatee in remainder.

2. The interest in an executory devise or bequest is transmissible to the heirs or executor of one dying before the happening of the contingency upon which it depends.

This was an action of DETINUE, for a negro woman slave, named Dorcas, and her two children, Jim and Maria. Plea—*non detinet.*

Upon the trial at Bladen, on the last circuit, before his Honor Judge BAILEY, it appeared that one Joseph Kemp died in the year 1805, leaving a will, which was admitted to probate; and William Kemp, the defendant's testator, qualified as administrator with the will annexed, at the September Term of the County Court of Bladen of that year. By this will, Joseph Kemp left James Morehead and William Robeson his executors, who never renounced the executorship of record, though it appeared that they were living several years after the death of Joseph Kemp; and that one of them died in the year 1813, and the other four or five years before William Kemp. The will of Joseph Kemp contained the following clause:

"I give to my son, William Kemp, two negro women, Dorcas and Ruth, during his natural life, and, at his death, to his oldest lawful son, if he arrives to the age of maturity; but, if he should have no son, or he should not arrive to full age, in that case, the said negroes and their increase to be equally divided between my two sons, David and John Kemp."

Soon after the death of Joseph Kemp, his son William took possession of the slaves, Dorcas and Ruth, and retained possession of Dorcas and her two children, Jim and Maria, until his death, in 1836. William Kemp died without hav-
(146) ing any child; and it appeared that he survived David and John Kemp several years. At May Term, 1837, of Bladen County Court, the plaintiff took out letters of administration on the estates of David and John Kemp, and after a demand and refusal of the slaves in question from the defendant, brought this action. The defendant's counsel contended that the grant of administration with the will annexed to William Kemp

upon the estate of Joseph Kemp, was void, inasmuch as the executors, James Morehead and William Robeson, never renounced the executorship of record, and that as they never refused the executorship, they or their executors were the proper persons to bring the action, and consequently the present plaintiff could not sustain it; and that the grant of administration with the will annexed to William Kemp being void, no presumption of assent on his part to the ulterior legatees could arise; and that William Kemp having held these slaves for thirty years, held them adversely to the executors of Joseph Kemp, and to all other persons; and, by his long possession, acquired a perfect and indefeasible title.

The defendant's counsel contended further, that the bequest to David and John Kemp was a contingent legacy, and that as they died before the contingency happened, upon which their legacy was to vest, viz: before the death of William Kemp without a lawful son, their legacy lapsed, and was not transmissible to their administrators

His Honor overruled these objections, and instructed the jury that if William Kemp, elected to hold the slaves as legatee under the will of his father, Joseph Kemp, and qualified as administrator with the will annexed of the said Joseph, the jury had a right to infer the assent of the executors to the ulterior legatees; and if they did so infer said assent, the title to the slaves in question was in the present plaintiff. He further charged the jury, that although David and John Kemp died before William, yet, if William died without having a lawful son, the legacy would not lapse, and the present plaintiff would be entitled to recover. The plaintiff had a verdict and judgment, and the defendant appealed.

No counsel appeared for either party in this court.

(147) GASTON, Judge. We are satisfied with his Honor's charge to the jury, and see no cause to reverse the judgment in this case. It may indeed have been well questioned whether William Kemp, or the representatives of William Kemp, after he had obtained letters of administration with the will annexed of Joseph Kemp, and had acted as such administrator without question during the lives of the persons therein nominated as executors, could be received to object that he was not administrator, because there was no renunciation of the executors of record; but however this might be, if William Kemp did (in the language of the Judge) "elect to hold the negroes as

a legatee under the will of Joseph Kemp," the court and jury were justified in any reasonable presumption of fact, after an undisputed possession of thirty-three years, and until the expiration of his interest in the legacy, to uphold the right of the legatees in remainder under the same will.

The second question raised is free from doubt. The interest in an executory devise or bequest is transmissible to the heir or executor of one dying before the happening of the contingency upon which it depends. Let the judgment be affirmed.

PER CURIAM. Judgment affirmed.

LEVI MILLER *vs.* JOHN G. ESKRIDGE.

If an action be wrongfully brought in the name of one without his knowledge or consent, and he have to pay the costs upon its dismission, his right of action for the *tort* against the person who wrongfully sued in his name, accrues, not from the commencement of the wrongful action, but only from the time when he is compelled to pay the money on account of it; and consequently the statute of limitations will begin to run only from that time.

This was an action on the CASE in which the plaintiff declared in *tort;* and upon the trial at Lincoln, on the last
(148) circuit, before his Honor Judge SETTLE, the only question was, whether the plaintiff's claim was barred by the statute of limitations. It appeared that the defendant, without the knowledge or consent of the plaintiff, instituted a suit before a magistrate, in the county of Rutherford, in the name of the plaintiff, against one Samuel Green, and prosecuted the suit by appeal until it was dismissed in the Superior Court; whereupon an execution issued against the plaintiff for the costs, which he paid within less than three years before the bringing of the present action. The warrant, which was the commencement of the suit against Green, was issued more than three years before the institution of the present suit. The plaintiff contended that the statute did not commence running until the payment of the money under the execution for the costs, while the defendant insisted that it commenced running from the wrongful institution of the suit against Green in the plaintiff's name.

His Honor being of opinion with the plaintiff, a verdict and judgment were rendered for him, and the defendant appealed.

No counsel appeared for either party in this court.

RUFFIN, Chief Justice. We think the statute of limitations does not bar the plaintiff's action. The statute begins to run

from the time the plaintiff might first have brought the same action for the injury, for which he therein seeks redress. Here, the action is to recover back money paid by the plaintiff as the cost of a suit instituted in the name of the plaintiff, without his leave; and it is an action on the case in *tort*, for consequential damages. When did it arise? From the plaintiff's paying the money: for then he first sustained actual injury or damage. If one dig a pit in the highway, all the world cannot sue him; but he only who falls into it. Therefore, the person who falls into it and gets hurt, may sue within three years from the time of his fall; although the pit were dug long before. So, in the case before us, the plaintiff could not have sued before he paid the money—for, what damage could he lay? Before that, he could complain of nothing but the danger, that he might be compelled to pay the costs. But such a possibility is
(149) not a good cause of action. There must be both a wrong and *some* loss from it, before one can bring a suit.

This is not like an action of trespass for a direct and immediate injury, in which the wrong and its effects are simultaneous. Nor is it like assumpsit, when after a breach, the damages continue to be developed, or even to increase, up to the trial; for, in such a case, the statute must necessarily run from the breach itself, since, at that time, nominal damages, at the least, were sustained; and, therefore, an action might then have been brought. But here, until payment by the plaintiff, he had no action; for, until that event, he suffered from the suit, brought in his name, no more than any other person did.

PER CURIAM. Judgment affirmed.

Den on dem. of JOHN LATTA et al. *vs.* JAMES MORRISON.

If one of several heirs, to whom a tract of land has descended, make a voluntary conveyance of it, and afterwards the other heirs file a bill for the sale of the land for partition to which the voluntary grantor is made a party defendant, and a decree be made ordering a sale by the master, the purchaser at the master's sale for a valuable consideration, if the master's report be confirmed, and he be ordered to execute a deed to the purchaser, will be a purchaser of the land within the meaning of the statute of 27th Eliz. (1 Rev. Stat., ch. 50, sec. 2,) and the master, in executing the deed to the purchaser, will be taken to have acted as the agent of the heir, and his deed will defeat the previous voluntary conveyance.

EJECTMENT for a tract of land, tried at Buncombe, on the last circuit, before his Honor Judge HALL.

The land in controversy, belonged originally to James Latta. He, in the year 1818, conveyed it to his son John Latta, though

there was a dispute on the trial whether this deed had ever been delivered. In the year 1823, John Latta voluntarily,
(150) and without any consideration, conveyed the land to several persons by the name of Case, who were the other lessors of the plaintiff. In the year 1834, some of the heirs at law of James Latta filed a bill in Equity, under the act of Assembly of 1812, 1 Rev. Stat., ch. 85, sec. 7, for the sale of all the lands which had descended to them from their ancestor, and that the purchase money might be divided among the heirs. To this bill John Latta was made a party defendant. There was an interlocutory decree, that the Master should sell the lands, and report to the court. The Master sold several tracts of land, and amongst others, the land in controversy, as land which had descended from James Latta to his heirs; and he made his report accordingly to the court, which was confirmed. John Latta was present at the Master's sale of the land, and did not dissent; but had an agent bidding for himself. The Cases were present at the Master's sale, and gave notice of their deed from John Latta, and claimed the land as belonging to them under the said deed. The defendant being the best bidder, purchased the land for a valuable consideration; and the court ordered a deed to be made to him for the land, which the Master executed, and he took possession. The court charged the jury, that under this state of facts, the law was with defendant, and that the plaintiff was not entitled to recover. There was a verdict and judgment for the defendant, and the plaintiff appealed.

No counsel appeared for either party in this court.

DANIEL, Judge, after stating the case as above, proceeded as follows: If John Latta, instead of the Master, had made a conveyance of the land to the defendant, for a full and valuable consideration, the title would have passed: and the prior deed from John Latta to the Cases, being voluntary, would, as to the defendant, have been deemed *void* by force of the statute of 27th Elizabeth, (see 1 Rev. Stat., ch. 50, sec. 2.) And the circumstance of the purchaser having notice of such a voluntary deed at the time of his purchase, would make no difference. There have been many decisions, both in England and this country,
establishing these rules of law. If the heirs of James
(151) Latta, had filed a petition for the partition of the lands descended to them, and the land in controversy, with the other lands mentioned in the Master's report, had been partitioned by Commissioners among the heirs, (John being one,) and

the report confirmed and a decree had, then John Latta would have been estopped to claim contrary to such a decree, *Mills* v. *Witherington*, 2 Dev. & Bat., 433, although the other lessors of the plaintiff would not have been. But here the land has been sold as part of the lands which descended from James Latta to his heirs. The Master reported accordingly, and the court confirmed the report. John Latta was a party, and had full notice of the proceedings. The Master, by order of the court under the act of Assembly, executed a deed for the land to the defendant. The Master, by force of the act of Assembly, and the order of the court, was the legal agent of John Latta, and the other heirs of James Latta, to make the conveyance to the purchaser of all the lands mentioned in the report to have been sold. The conveyance by the Master to the defendant, for a valuable consideration, made him a purchaser of the land within the meaning of the statute of 27th Elizabeth, in like manner as if John Latta had himself executed a conveyance of the land. The Cases being volunteers, cannot be permitted to set up their title against that of the defendant, who is a purchaser for a valuable consideration from John Latta's agent, the Master in Chancery. The opinion of the court was correct, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

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(152) Den on dem. of ROBERT LOVE *vs.* NINIAN EDMONSTON.

1. A party, who has been let into possession of land, under a contract of sale, or for a letting which has not been completed, is only a tenant at will of the vendor; and his interest is determinable *instanter* by a demand of the possession. In such case, a three weeks' notice to quit is a determination of the tenancy; or, if the tenant do any act which amounts to a disclaimer of the vendor's or lessor's title, it operates as a forfeiture, and no notice to quit is necessary.
2. The rule that a vendee cannot dispute his landlord's title, extends to the case of one who takes possession under a contract of purchase—he cannot controvert the title of the person who let him into possession.

This was an action of EJECTMENT, for a tract of land, tried at Haywood, on the last circuit, before his Honor Judge HALL.

The lessor of the plaintiff read in evidence a deed from James Lockhart to himself, covering the land in dispute, and dated the 28th of July, 1829. He also shewed a regular chain of conveyances from the State to Lockhart; and then exhibited the following written agreement between himself and the defendant, to wit:

"Robert Love and Ninian Edmonston agree thus, as respects the tract of land on which said Edmonston lives, called the Probe Bottom, which has been valued to the said R. Love, under a contract with James Lockhart and said Love; and the said Edmonston agrees thus with the said Love, that in case the said Lockhart will unincumber the said tract of land from a mortgage to James Greenlee, he will well and truly pay to the said R. Love, agreeably to the said valuation, six hundred dollars, in three annual payments, with interest on the same. But, if otherwise, that the said James Lockhart will not come forward and unincumber the said land, then the said Edmonston will relinquish all claim from any agreement between the said Love and Edmonston; and that the said Edmonston will pay the said Love rent for the present year, provided the said Love hold on to his agreement with James Lockhart."

The lessor then exhibited a regular notice to quit, which was served upon the defendant three weeks before the declaration in ejectment was issued; and proved that, upon the
(153) notice being served upon him, the defendant said, "the land does not belong to Love—I will shew them who owns the land, and who is entitled to rent."

The defendant objected that he had not a sufficient notice to quit; and moved to nonsuit the plaintiff. The plaintiff's counsel insisted that no notice was necessary; as the defendant disclaimed to hold of the plaintiff's lessor; of which opinion was his Honor, and the motion for the nonsuit was refused. The defendant then exhibited a grant from the State to one Allison, which, it was alleged, covered the same land, and was of prior date to that under which the lessor of the plaintiff claimed; but the Court was of opinion that the defendant was estopped from shewing title out of Lockhart, or the lessor of the plaintiff in this action. The plaintiff's lessor had a verdict and judgment, and the defendant appealed.

No counsel appeared for either party in this Court.

DANIEL, Judge, after stating the case as above, proceeded as follows: A party who has been let into possession of land under a contract of sale, or for a letting which has not been completed, is only a tenant at will of the vendor. Leigh's N. P., 861, who cites *Ball* v. *Callimore*, 2 Crom. Mee. & Ros., 120, 1 Gale, 96; *Dunk* v. *Hunter*, 7 Eng. C. L., 115; *Bingham* v. *Cartwright*, 5 Eng. C. L., 153, 154. And such interest is determinable *instanter*, by a demand of the possession. *Doe d. Jones* v. *Jones*, 21

Eng. C. L., 153, 154; *Den, on dem. Carson* v. *Baker*, 4 Dev., 220. The tenant then having only the right of *egress* and *ingress* to remove his effects. Where A. entered into an agreement with B., to sell land then in possession of the latter, on certain terms; and to execute a conveyance, in case A. should be found owner thereof, and could make a good title thereto; and agreed that, in the mean time, B. should remain in possession; held that A. could not bring ejectment against B., without having demanded the possession, or otherwise having determined B's tenancy. *Doe d. Newby* v. *Jackson*, 8 Eng. C. L., 126. We think the three weeks' notice to quit, which had been given to the defendant, certainly determined his tenancy. If the tenant, however, does any act which amounts to a dis-
(154) claimer of the lessor's title, it operates as a forfeiture, and notice to quit is not necessary, for the landlord may treat him as a trespasser. As if he refuse to pay rent, on the ground that another person had ordered him not to pay any; or if he attorn to another person. *Doe d. Whitehead* v. *Pittman*, 28 Eng. C. L., 375; Bul. N. P., 96. So if the lessee disclaims the lessor's title. Leigh N. P., 876. We think, on the question of notice, the charge of the Judge was correct.

Secondly. It is a rule that the lessee cannot dispute his landlord's title. *Doe d. Johnston* v. *Baytup*, 30 Eng. C. L., 67. And this principle extends also to the case of one who takes possession under a contract of purchase; he cannot controvert the title of the person who let him into possession. The American cases on this head are numerous. Leigh's N. P., 926, note, (American edition.) The circumstance of the defendant being in possession of the land, when he took from Love the deed containing the conditional agreement of purchase, did not enable him in this action to set up the title of Allison, because, by the terms of that agreement, he holds the possession thereof under Love. The case of *Doe d. Bullen* v. *Mills*, 29 Eng. C. L., 16, was, where A., having without title entered upon land and built a cottage, afterwards accepted a lease, (by indenture,) from B., C. claiming the land as his own, paid to A. £20, to give up the possession to him; held that A. had estopped himself from controverting the title of B.; and that C. was bound by the estoppel, as having come in under, and received the possession from, B.

We think the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

(155) THE GOVERNOR TO THE USE OF LUKE HUGGINS *vs.* WILLIAM MONTFORD et al.

1. A sheriff's bond to "his Excellency M. S. Captain General and Commander in Chief, in and over the State of North Carolina in the sum of $10,000, to be paid to his Excellency, the Governor, his successor and assigns:" is a bond payable to the Governor in his official capacity, and is an official bond within the act of 1823 (Tay. Rev., ch. 1223), which was in force when it was taken.
2. The sureties to a sheriff's bond, with a condition in the ordinary form, are liable under the act of 1829, 1 Rev. Stat., ch. 109, sec. 15, for an amerciament of the sheriff for a default committed during his official year, though the final judgment for the amerciament may not have been rendered until after the expiration of the year.
3. The records of the proceedings against a sheriff for an amerciament imposed upon him, are not evidence against his sureties to prove his default; but they are admissible against them to prove the fact of the existence of the amerciament itself.

This was an action of DEBT, brought upon the official bond of Brice Fonville, as Sheriff of Onslow county. The bond was executed by Fonville, and the defendants as his sureties, at November Term, 1831, of Onslow County Court; and was in the following words: "Know all men by these presents, that we, &c., are held and firmly bound unto his excellency Montfort Stokes, Captain General and Commander in Chief, in and over the State of North Carolina, in the sum of ten thousand dollars, to be paid to his excellency the Governor, his successor and assigns; to which payment well and truly to be made we bind ourselves, &c."

The defendants pleaded *the general issue*, and *conditions performed and not broken*, and upon the trial of the issues at Onslow, on the Spring Circuit of 1838, before his Honor Judge SAUNDERS, it appeared that Brice Fonville, the sheriff, having failed to return certain executions in favor of the relator, which were returnable to the August Term, 1832, of Onslow County Court, was, at that term, upon proceedings taken by the relator for that purpose, amerced one hundred dollars *nisi;* whereupon a *scire facias* issued against him, returnable to the ensuing term in November, at which time a judgment was rendered according to the *sci. fa.* for one hundred dollars and costs. And (156) at the same term, to wit, November, 1832, the said sheriff was again amerced one hundred dollars for not returning another execution which was returnable to that term in favor of the relator; upon which a *scire facias* issued returnable to the ensuing term in February, 1833, when judgment was rendered against the said sheriff, according to the *scire facias*, for one hundred dollars and costs. It appeared further from the

records, that executions issued upon these two judgments against the sheriff, which were returned with the endorsement "no property to be found." It was also in evidence, on the part of the relator, that Brice Fonville did not renew his bond at the November Term, 1832; nor ever afterwards acted as sheriff. The non-payment of the two judgments above mentioned and costs, was assigned as the breach of the bond for which this action was brought.

The defendant's counsel, admitting the bond declared on to be the act and deed of the defendant, insisted that the evidence was not admissible to establish any breach of duty by Fonville, as against the defendants; and that the said evidence, if admissible and relevant, did not in law, and in fact, shew any breach of the conditions of the bond given by the defendants; and also that the said obligation was not taken, according to the statute in such case made and provided, and that the Governor, in his official capacity, could sustain no suit thereon: and he prayed the Judge to instruct the jury accordingly—each of which instructions his Honor refused to give. The plaintiff had a verdict and judgment, and the defendants appealed.

J. W. Bryan for the defendants.
J. H. Bryan for the plaintiff.

RUFFIN, Chief Justice. The court is of opinion, that neither of the defendant's objections is sufficient to entitle them to a reversal of the judgment.

One is, that the action ought to be in the name of Montfort Stokes; because, as it is said, the bond is not made payable to him as Governor, and therefore cannot be sued on in the name of his successor. The bond is in these words: "know
(157) all men, &c., that we, &c., are held and firmly bound unto his excellency Montfort Stokes, Captain General and Commander in Chief, in and over the State aforesaid, in the sum of $10,000, to be paid to his Excellency the Governor, his successor or assigns: to the which payment, &c." Now, from these words, a court can, and we think must, by a reasonable intendment, perceive that this bond was meant to be payable to the Governor of this State, in his official capacity; and it is our duty to effectuate the intention of the parties and uphold the instrument, if it can be done without violence to the language. There is no such violence here; but this opinion is quite consistent with the language. Even if the epithet "Governor" were not found in the instrument, we are not sure the bond would be bad; since

we know the legal identity of the Governor and the Captain General. But any difficulty of that sort is removed by the fact that the money is, upon the face of the bond, "to be paid to the Governor." It is therefore an official bond within the statute of 1823, Taylor's Rev., ch. 1223; which was in force when the bond was given.

It is next said, that the defendants are not liable in this action for, at least, one of the amerciaments which was imposed after the expiration of the official year for which the defendants were the sheriff's sureties. But the default was in that year, and also the amerciament *nisi;* though the award of execution against the sheriff on *sci. fa.* was after the year. The bond of a sheriff would not, in itself, oblige the sureties to answer amerciaments and fines on their principal; but the statute 1829, ch. 33, 1 Rev. Stat., ch. 109, sec. 15, makes them, by express enactment, liable for them "as for other deficiencies in the official duty of the sheriff." Therefore, according to the general principle, those persons are liable for the amerciament, who were bound as the sureties of the sheriff, at the time of the default committed by which the penalty was incurred. Certainly, if Fonville had been reappointed sheriff and given a new bond in Nov., 1832, the sureties in this last bond would not be bound for previous defaults, although the judgment for an amerciament therefor might have been rendered in their time. It follows, that those of the preceding year are liable.

(158) The remaining objection, is upon the authority of *McKellar* v. *Bowell*, 4 Hawks, 34, that the records of the proceedings against Fonville, were not evidence against the sureties. It is admitted, that they do not prove the alleged breach of duty, and, therefore, are not competent evidence for that purpose. But they are evidence to prove the amerciaments themselves, that is the fact of their existence; and by force of the statute, are necessarily admissible for that purpose. As to the default for which the fine was laid: that must have been proved by other evidence; since it is stated in the case that "it appeared the sheriff failed to return certain executions in favor of the relator;" for which certain steps were taken to obtain the amerciaments, which the plaintiff then also shewed in evidence. The judgments against Fonville were, then, only used to prove the amerciament themselves; and certainly they were competent to that extent, since there is no other mode by which it can appear that there was an amerciament, and without this evidence, the Act of Assembly would be entirely defeated.

PER CURIAM. 121 Judgment affirmed.

WILLIAM B. MOFFITT et al., Adm'rs of HUGH MOFFITT, *vs.* JAMES GAINES.

If the surety to a bond or note be sued alone, the principal debtor will be incompetent as a witness for him, because, if the plaintiff succeed, he will be liable to the surety for the costs of the action; but the principal may, in such action against the surety, be made competent by a release from the surety, before he is called to testify.

This was an action of DEBT, upon a single bill, in the following words, to-wit:

"One day after date we promise to pay Hugh Moffitt
(159) the sum of eight hundred and fifty dollars, for value received of him. Witness our hands and seals. April 2nd, 1832.

WM. M. GAINES, SEAL.
JAS. GAINES, SEAL."

TEST.

The suit was brought against James Gaines alone, who pleaded payment at and after the day when the bill fell due; and, on the trial, at Randolph, on the last circuit, before his Honor Judge DICK, the defendant, in support of this plea, offered in evidence the deposition of William M. Gaines, the principal obligor, who was then a resident of the State of Alabama. The deposition was regularly taken, after a deed of release from the defendant to the witness had been executed, but it was objected to on the ground that the witness had such an interest in the result of the suit as rendered him incompetent. The objection was overruled by the Court, and the deposition permitted to be read; upon which the jury found a verdict for the defendant, and the plaintiffs appealed.

No counsel appeared for the plaintiffs in this Court.
Winston and *Mendenhall* for the defendant.

DANIEL, Judge. A party to a bill or note is, in general, a competent witness in an action on such instrument, unless he be directly interested in the event of the suit. If his interest be equally affected, whichever way the verdict goes, he is competent to give evidence for either party. 2 Stark. Ev., 179; 1 Leigh N. P., 501. In this case, if the witness, (being the principal obligor,) had not been released, he would have had an interest in the event of the suit, to the amount of the defendant's cost, in case he were cast. For the surety would then be entitled to recover of the witness, not only the money mentioned in the bond, which the obligee had recovered of him, but also the cost

which he was put to in the action. *Jones* v. *Brooke*, 4 Taunt., 464; *Burgess* v. *Cuttill*, 25 Eng. Com. L., 398. Whereas, if the plaintiff should fail in this action, he could not recover the cost which he had expended in a suit thereafter to be brought against the witness, the principal obligor in the bond. The witness having had an interest in the event of the cause to
(160) the extent above mentioned, the defendant released him before his deposition was taken, and he then became a competent witness. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

BENJAMIN BURGIN, sr., *vs.* JAMES BURGIN, sr., et al.

Where a debtor conveyed a slave, together with other property, both real and personal, to his creditor, to hold to him and his assigns forever, but the deed was expressed to be made upon condition that if the debtor should pay the amount due by a certain time, it was to be void; and the creditor covenanted that, until that time, the debtor should retain the possession and enjoyment of the property; and, before the expiration of the time, the creditor, with the assent of the debtor, took possession of the slave, from whom he was taken under an execution in favour of another person against the debtor, *it was held*, that under the deed, the creditor had the legal title of the slave; and that only such an equitable interest remained in the debtor as could not be taken and sold under an execution; and that, for the taking the slave under the execution against the debtor, the creditor might maintain an action of trover.

This was an action of TROVER, for the conversion of a negro boy, named Isaac; and upon the trial, at Burke, on the last circuit, before his Honor Judge HALL, the case was as follows:

Benjamin Burgin, the younger, by a deed duly executed, on the 4th of December, 1837, conveyed to the plaintiff sundry articles of real and personal property, among which was a negro boy slave, named Isaac, to have and to hold unto the plaintiff, his heirs and assigns forever. The said deed was expressed to be made upon the condition, that if the bargainor should pay to the plaintiff, on or before the 16th day of August following, the sum of $3,669.05\frac{3}{4}$ cents, and on or before the 2nd day of December following, the further sum of $100, (these being the respective amounts of two notes of the bargainor, holden
(161) by, and due unto the plaintiff,) the said deed should be void. And it was by the said deed further provided, that if payment should not be made as aforesaid, then the plaintiff should enter upon, and take possession of, the premises, and make sale thereof, and out of the proceeds pay himself the said sums, and, for the surplus of the proceeds, if any, account

with the bargainor; and thereby the said plaintiff did covenant with the bargainor, that until there should be a breach of the foregoing condition, so as to entitle the plaintiff to enter, the bargainor should remain in the quiet possession and enjoyment of the premises. In virtue of this deed, and with the consent of the bargainor, the plaintiff took possession of the negro Isaac in the month of January, 1838; and, on the 14th of April, 1838, the defendant, Curtis, assisted by the defendant, Burgin, and indemnified by the defendant, Fleming, took him out of the possession of the plaintiff, as the property of Benjamin Burgin, jr., to satisfy an execution issued on that day, against the goods and chattels of the said Benjamin, on a judgment rendered before a Justice of the Peace in favour of the said Fleming. The negro slave Isaac was, under this taken, withheld from the plaintiff forty days, and then re-delivered—and the question was, whether for this taking and detaining of the slave, the plaintiff could maintain trover? It was in evidence, that at the time of the execution of the deed to the plaintiff, Benjamin Burgin, jr., was much involved in debt; and, from and after the execution of that deed, was deemed to be insolvent. On the part of the defendant it was contended, that under the deed aforesaid, *Benjamin Burgin, Junior*, was, at the time of the said taking and detention, entitled to the possession, use and enjoyment of the said slave—and that it was fraudulent in him, as against his other creditors, to surrender the property to the plaintiff, before the expiration of his allotted term of enjoyment. The Court instructed the jury, that if the deed to the plaintiff was executed *bona fide* to secure the payment of a debt truly due the plaintiff, and not to delay or defraud creditors, the plaintiff under that deed had such an immediate legal interest in the slave Isaac as would entitle him to maintain the action of trover. The plaintiff had a verdict and judgment, and the defendants appealed.

(162) No counsel appeared for either party in this Court.

GASTON, Judge, having stated the case as above, proceeded as follows: By the operative words of the deed, the whole legal interest of the bargainor in the subject matter of the conveyances passed to the plaintiff, subject to a condition subsequent, upon the happening of which, that interest was to be divested. But, in the mean time, and unless that condition should be performed by the bargainor, the interest of the plaintiff was, in law, absolute. In the contemplation, however, of a Court of

Equity, the conveyance was but a security for the payment of a debt, and the plaintiff a trustee, holding the legal estate subject to the trusts in the deed contained. One of these trusts was, that until failure in the performance of the condition, the bargainor should retain the possession, use and enjoyment of the property. If this beneficial interest of the bargainor were liable to seizure and sale under execution, then it would seem that the taking of the slave Isaac, under the execution of the defendant, Fleming, might have been justified. But it was not so liable. The common law knew nothing of, and of course regarded not *equitable* interests; and, under our statute of 1812, re-enacted in Revised Statutes, title Executions, ch. 45, sec. 4, this interest, if equitable merely, was not subject to executions, because it was not co-extensive with the legal interest. See *McKay* v. *Williams*, 1 Dev. & Bat. Eq. Rep., 398. The taking and detention of the slave in question were, therefore, tortious; and, for this injury, the defendants were in law liable to him who at law owned and held the slave. Such is the view which must be taken of the case, if the interest reserved in the deed to the bargainor be purely an equitable interest. But if it be of a legal nature—so that *at law*, the bargainor was the temporary owner of the slave until failure of the condition, the result would be very different. The plaintiff could not then maintain trover for a conversion of the property, while this legal interest was outstanding in another—nor could he set up a mere *voluntary* surrender of this interest to the injury of an existing creditor—and the interest itself would be the subject of seizure and sale, under Fleming's execution.

(163) We are of opinion that the interest reserved to the bargainor was purely equitable. The *legal* construction of the instrument is, that the dominion thereby passes to the bargainee, subject only to the condition of defeazance; and the bargainee covenants, to permit the bargainor to have the possession of the bargainee's property for a limited time. If the bargainee were to break this covenant, and take possession against the bargainor's will, before the expiration of that time, the sole remedy of the barginor would be on the covenant. He could not bring detinue—or trover—or trespass for the property—because he had no dominion in it. In law, this covenant is personal; and, in law, the covenantee may at pleasure waive it.

We are in this action restrained to the consideration of the legal rights and relations of the parties. And it by no means follows, that because according to these, the plaintiff must be

regarded as the owner of the property under the deed from the time of its execution, therefore he is not to account, in a proper forum, for the *profits* of the property until there was a sale pursuantly to the requisitions of the deed.

PER CURIAM. Judgment affirmed.

MALCOMBE HORTON *vs.* JOHN HENSLEY et al.

Possession alone is sufficient to maintain the action of trespass against mere *tort feasors*. And, in such action, all procurers, aiders and abettors—nay, even those who are not privy to the commission of a trespass for their use and benefit, but who afterwards assent to it—are equally liable with those who commit the act of trespass.

This was an action of TRESPASS QUARE CLAUSUM FREGIT, tried at Buncombe, on the last circuit, before his Honor Judge HALL.

The declaration was for an injury done by the defendants to a mill dam, which the plaintiff alleged was in his posses-
(164) sion. The dam was across a creek that ran through the land on which the plaintiff resided at the time of the alleged trespass. Upon the trial, it was in evidence that the defendants went to the plaintiff, and informed him that they were authorised to lay off a slope in the dam, and asked his permission to do so; upon which the plaintiff denied that they had any such authority; said that he gave them no permission to do any thing which the law did not authorise them to do; and that if they tore away the dam, he would sue them. The defendants thereupon proceeded to the dam; and, after a short conference, Gardner, one of them, marked out a slope upon it, when one of the other defendants asked Gardner if they should cut the dam. To this enquiry Gardner replied, "you know your own business; but I am afflicted with rheumatism, and can't go into water." The other defendants then cut away twenty-eight feet of the middle of the dam, down to the mud sill; and whilst this was doing, Gardner was sitting on the bank of the creek, in sight of the scene of operations, and saw, and remarked to another person in company with him, upon what was going on. During the time the defendants were engaged in cutting the dam, the plaintiff came down to the place where Gardner was, and upbraided them for tearing away the dam, after pretending that they only designed to lay off a slope. To this Gardner replied, that he had done his best to prevent it; when the plaintiff said that he, Gardner, could have prevented it if he had tried, and that he

was the cause of it. In another conversation, Gardner said that he could prove, by the person with whom he was sitting, that he had nothing to do with it; whereupon one of the other defendants asked him if he did not agree to go his *bob;* to which Gardner, after some hesitation, replied, " if you bring me in, I have two or three hundred dollars, which have not yet been spent." It was further in evidence that the plaintiff had a field in cultivation, about two hundred yards from the dam; that he had been living on the land several years; that eight or ten years before the alleged trespass, there was a mill house connected with this dam, which was possessed and used by him in grinding grain for himself and neighbors; that the mill house
(165) was carried away by a freshet, eight or ten years before and had never been rebuilt; that a few days before the dam was cut, the plaintiff had worked upon, and repaired it, preparatory, as he declared at the time, to rebuilding the mill. There was also evidence that the plaintiff had a fish trap at the dam, which was destroyed by the defendants when they cut the dam.

The defendants offered evidence to shew that the plaintiff's design, in repairing the dam, was not to rebuild the mill, but more successfully to catch fish. They also offered in evidence a grant from the State to John G. Blount, dated in 1796, for the land on which the plaintiff lived. The plaintiff offered no evidence of title other than his possession; and the defendants did not pretend that they had any title themselves, nor any authority from Blount to enter upon the land.

The counsel for the defendants contended that the plaintiff was not entitled to recover, because he had shewn no possession; and, if entitled to recover any thing, he was entitled to nominal damages only, and requested the court so to charge the jury.

His Honor instructed the jury, that if they inferred that the mill, before it was carried away, had been in the possession and use of the plaintiff, and that he repaired the dam a few days before the trespass complained of, with the view of repairing the mill, these facts, especially when connected with the evidence that the defendants had applied to the plaintiff for his permission to make a slope upon the dam, established such a possession in the plaintiff as would entitle him to recover; and that he had a right to recover damages to the extent of the injury which the dam had sustained; and that all the defendants who had aided, abetted, counselled or commanded the trespass, or who had assented to it after it was done, were equally liable with

those who actually committed the act complained of. The plaintiff had a verdict and judgment against all the defendants, and they appealed.

No counsel appeared for either party in this court.

GASTON, Judge. We see no ground on which this judgment can be impeached. It is not to be questioned but that possession alone is sufficient to maintain an action of trespass
(166) against mere *tort-feasors*. The evidence to shew possession in the plaintiff was pertinent, direct and uncontradicted. And in trespass, all procurers, aiders and abettors—nay, those who are not even privy to the commission of a trespass for their use and benefit, but who afterwards assent to it—are in judgment of law, principals. Com. Dig't. Tres. C. 1, 4 Inst., 317.

The judgment is affirmed.

PER CURIAM. Judgment affirmed.

Den on dem. of WILLIAM D. JONES et al. *vs.* REBECCA POSTEN.

1. Where a testator, who had three tracts of land adjacent to each other, over parts of all which his plantation extended, and had three sons, R., J. and W., of whom R. and J. were married, and resided upon the testator's lands, devised to his wife "full possession of all the plantations and stock, &c., during her natural life or widowhood, except the particulars that may hereafter be mentioned," and then devised to his son R. "all the 200 acre tract of land that he now lived on, and so much of the old tract as lies on the same side of Homony creek," &c.; and a subsequent part of his will, devised as follows: "I will and bequeath to my son J. all the remaining part of the old tract of land, exclusive of the part above mentioned, to my son R., and bequeath unto my son J. my still and all her furniture at the death or marriage of my wife. Also my wagon and hind gearing at her death;" *It was held* that the testator's son J. took an immediate estate in fee in the lands devised to him, and not an estate in remainder after the death or marriage of the testator's widow.

2. In expounding a will, the grammatical construction must prevail when an intent to the contrary does not plainly appear.

This was an action of EJECTMENT, for a tract of land, tried at Buncombe, on the last circuit, before his Honor Judge HALL; when the jury found the following special verdict:

"That the paper writing given in evidence, is the last will and testament of John Posten, deceased; that in the said will are contained, among others, the following clauses: 'Item 2nd.
(167) I will and bequeath unto my dearly and well beloved wife, Rebecca, full possession of all the plantation and stock,

house and household furniture, during her natural life or widowhood, except the particulars that may hereafter be mentioned. Item 8th. I will and bequeath unto my son, Robert, all the two hundred acre tract of land that he now lives on, and so much of the old tract as lies on the same side of Homony creek, above Joshua Jones, Junior's, land, and all the land that is included in a bottom, known by the name of the Wagon Ford Bottom, on the north side of Homony creek. Item 9th. I will and bequeath to my daughter, Mary, fifty dollars. Item 10th. I will and bequeath to my son, John A. B., all the remaining part of the old tract of land, exclusive of the part above mentioned to my son Robert; and bequeath unto my son John A. B. my still and all her furniture, at the death or marriage of my wife. Also, my wagon and hind gearing, at her death. Item 14th. I will and bequeath unto my son William, the three hundred acre tract of land that I now live on—the house and cupboard, at the death or marriage of my wife—and one horse and saddle, and mill and her furniture;' that the land therein devised to the testator's son, John A. B. Posten, is the land in controversy; that the lessors of the plaintiff claim title under the devise made to John A. B., and have his title thereto; that Rebecca Posten, the defendant, is the widow of the testator and devisee under said will, and that she has never since married, and is in possession of the land in controversy; that the lands devised in the said will, comprise the whole of the testator's real estate, and lie in three adjoining tracts, to wit, the three hundred acre tract on which the testator had his dwelling house, mill, &c.—the tract devised to his son Robert, and the lands devised in part to Robert, and the remaining part to John A. B., being that in dispute; that the testator's plantation embraced lands on all the tracts, two-thirds of which were on the lands devised to John A. B., and the field thereon extending up to within two hundred yards of the mansion house; that the testator had no other sons except the three devisees; that Robert and John were married and living on the testator's lands, but John was not living on the lands devised to him; and that William was a boy under age,
(168) living with his father; that the testator died, not long after the date of his will, which was on the 27th of January, 1819. If, in law, the devisee, John A. B., took a present interest under the will, they find the defendant guilty; but if he took only a remainder after the wife's death or marriage, they find her not guilty."

Upon these facts, the court gave judgment for the plaintiff's lessors, and the defendant appealed.

No counsel appeared for either party in this court.

GASTON, Judge. The will of John Posten, which we are called upon to expound, is set forth at length in the transcript. At the time of its execution, he was seized of three adjacent tracts of land, and no other. The first of these was a tract of 300 acres, on which his dwelling house and mills were situate; the second, a tract of 200 acres, on which his son Robert was living, being the same which, in the will, is altogether devised to the said Robert; and the third, a tract called the old tract, being the same whereof a part is in the will given to Robert, and a part to the testator's second son, John A. B. Posten. The inclosed land or plantation of the testator covered parts of all these tracts, and embraced two-thirds of the part given to John A. B., whereof the field approached to within 300 yards of the testator's dwelling. The testator had three sons, Robert, John A. B., and William, of whom the two former were married and living on land of their father; but John was not living on the part devised to him in the will. William was a boy under age, living with his father. The testator died very soon after the execution of the will. And the sole question is, whether the devise to John A. B. Posten was of an immediate fee, or of an estate in remainder after the death or marriage of the testator's widow.

We cannot pronounce with confidence what was the intention of the testator; but, following as well as we can the established rules of construction, we are brought to the conclusion that, under the will, John took an immediate fee simple.

The disposition made for the testator's wife of "full possession of all the plantation and stock, house and household
(169) furniture, during her natural life or widowhood," is qualified by the exception, "except the particulars that may be hereafter mentioned." Upon these words we should be obliged to hold, that the exception is broad enough to take in any subsequent disposition that might be therein made, of the plantation, as well as of the stock and other articles. The plantation, stock, house and household furniture, are enumerated as constituting one subject of gift—and the subject, consisting of these individuals, is given with the modification, and liable to the exceptions, expressed in the donation. The correctness of this opinion is made the more manifest, by examining the devise

to the testator's son Robert. The words of it are, "I will and bequeath to my son Robert, all the 200 acre tract of land *that he now lives on*, and so much of the old tract of land as lies on the same side of Homony creek, above Joshua Jones's land, and all the land included in a bottom known by the name of the Wagon Ford Bottom, on the north side of Homony creek." The testator recognizes that the devisee is then actually living on the 200 acre tract; and if the testator did not design to clothe *this possession* with a *title*, but to confer a right of possession at a future day—it cannot be doubted, we think, but that he would have here used some words indicative of this his purpose. This part of the devise to Robert, admits of no other construction than as passing an immediate estate in fee. If so, *all* contained in that clause, being but the sum of what is thereby given, is necessarily also given immediately; and, therefore, the whole of the land given to Robert is excepted out of the disposition to the testator's widow. After this devise to Robert, comes a bequest of $50 to one of the testator's daughters, Mary; and then follows the item or section of the will which is the immediate subject of the present dispute. If the first sentence be considered *per se*—and taken as a whole—it leaves no room for doubt. "I will and bequeath unto my son John A. B., all the remaining part of the old tract of land, exclusive of the part above mentioned to my son Robert." There could be no reason for refusing to hold this to be an immediate gift, after having ascertained that a devise in the same terms to Robert was to be so expounded. If
(170) the gift to Robert comes within the "exception" to the disposition made to the wife, so must this also. The enquiry then is, does the sentence stop here? Is the force of the *act*, expressed by the *terms*, "I give and bequeath," here expended? The clause or section continues thus: "and bequeath unto my son John A. B., my still and all her furniture, *at the death or marriage of my wife*—also, my wagon and hind gearing, *at her death.*" Are these words, "at the death or marriage of my wife," or the words, "at her death," in the same sentence which contains the devise of the land—so that the modification expressed by them is applicable to the devise, or are they parts of distinct sentences, containing modifications of distinct gifts? It seems to us that the rules of grammar oblige us to say—if there be no plain reason to the contrary—that these modifications are not parts of the sentence in which the land is devised, and do not qualify that devise. The still and furniture, the wagon and hind gearing, do not follow on after the land, as an addition or enu-

meration of further articles making up the subject matter on which the beginning words of the section "I will and bequeath" are to operate—but are separated therefrom by distinct words of gift, and a distinct nomination of the legatee, "and bequeath unto my son John A. B.," &c. This shews that the testator is now dealing with a new subject, and that the words which follow apply to that only, and not to the preceding subject—unless the intent that they should do so is plain. The idea is fortified by the peculiar language of the last part of the clause, "also, my wagon and hind gearing, *at her death.*" Here is a modification with respect to the gift of these last articles, somewhat though slightly variant from that in the disposition of the articles just before mentioned. The clause must, therefore, be regarded as consisting of three sentences, each containing a separate disposition of the subject matter of gift therein mentioned. The second and third are gifts to be enjoyed at a future day—but the first is without qualification, therefore immediate and absolute.

We feel that this mode of exposition is *artificial*, and of course not well calculated to eviscerate the intent of those who have expressed themselves in inartificial language. But
(171) we can find in this case no plain indications of the testator's meaning; and, unless we resort to the rule adopted, we shall be left altogether to conjecture. What the result of such conjecture might be, it is not easy to say. On the one hand, it seems strange that the testator should, in providing for his wife, give her the *full possession of all his plantation*, with the exceptions thereinafter mentioned, and then, by exceptions, take away more than two-thirds of the seemingly liberal gift. But, on the other hand, it is manifest that, in the devise to one of his married sons, he intended a provision securing to him a present home for himself and his family—and it is very improbable that, in a devise to another married son, he intended to make a provision for him and his family after the death or marriage of testator's widow! But we are not permitted to indulge in conjecture. The grammatical construction must prevail, when an intent to the contrary does not plainly appear.

As our opinion corresponds with that expressed by his Honor, in the court below, the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

(172) JOHN L. TERRELL *vs.* GIDEON WIGGINS.

If the charge of the Judge to the jury be correct, or be such that the party against whom a verdict is found cannot complain of it, a mistake of the jury in finding a verdict without evidence, or against evidence, or against the law, can be corrected only by the Judge presiding at the trial, and cannot be revised by the Supreme Court upon an appeal.

This was an action of ASSUMPSIT, tried at Franklin, on the last circuit, before his Honor Judge NASH.

On the trial, the plaintiff proved that a judgment before a justice of the peace was granted against one Brown and the defendant, who was the surety of Brown in a joint bond or note not expressing any suretyship on its face; that the plaintiff stayed the judgment, and afterwards paid the same. It also appeared, that some months after the judgment was given, and after the stay was out, the now plaintiff requested the plaintiff in that judgment to give him the paper, and as he lived near Brown, he would collect the debt out of him; that several months afterwards, the judgment being applied for by a constable, in order to collect it for the plaintiff in the judgment, the now plaintiff gave it to him, but requested him to see the plaintiff in the judgment, and get him to grant indulgence to Brown until the succeeding autumn, when Brown would be able to pay, observing at the same time, the plaintiff knows I am able; that about two weeks afterwards, the constable, going to make his levy on Brown's property, was informed by the now plaintiff, that Brown had confessed a judgment to him during the interval, and he had seized Brown's property under the execution; that Brown's property was accordingly sold to satisfy the now plaintiff's demand, and that Brown had all along before that time, property enough in possession to satisfy the judgment stayed by Terrell, the now plaintiff. On this state of facts, the defendant contended that Terrell having himself prevented the collection of the debt from Brown, was not entitled to recover from the defendant. The plaintiff contended that he was the surety both of Brown and the defendant—that both (173) were principals as to him; and that he was entitled to recover what he had paid to satisfy the debt of the defendant.

His Honor being of opinion that the plaintiff was the surety as well of the defendant as of Brown, instructed the jury to find for the plaintiff. The jury retired, and after some time returned into court and asked the Judge whether fraud must be proved or might be inferred? to which his Honor replied, that the jury

were at liberty to infer any thing which the facts would properly warrant; but, nevertheless, directed them that if they believed the evidence in the case, they were bound to find a verdict for the plaintiff. The jury again retired, and after some time, returned with a verdict for the defendant. A new trial was moved for, on the ground that the verdict was against law and the instructions of the court; but his Honer, holding the verdict to agree with the substantial merits of the case, though against his instructions, and the strict legal merits, declined to disturb the verdict. The plaintiff's counsel then objected that the instruction to the jury that they might infer fraud was erroneous, and calculated to mislead the jury, notwithstanding the general direction to find on the evidence for the plaintiff; and prayed a new trial on that ground, which being refused, and judgment given for the defendant, the plaintiff appealed. The case was submitted without argument by

W. H. Haywood for the plaintiff, and
Badger for the defendant.

RUFFIN, Chief Justice. The jury could not have been misled to the prejudice of the plaintiff; for the charge of the Judge was as explicit as it could be, in favor of the plaintiff. There was, therefore, no error on the part of the court—at all events, of which the plaintiff can complain. Then, as to error, or rather mistake of the jury in finding a verdict without evidence, or against evidence, or against law; it can, if it exist, be corrected only by the Judge presiding at the trial, and as has been often decided, is beyond the reach of this court. *Goodman* v. *Smith*, 4 Dev., 450; *Bank of Newbern* v. *Pugh*, 2 Hawks, 389.

PER CURIAM. Judgment affirmed.

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(174) WILLIAM HURDLE et al., Ex'rs of HARMAN HURDLE, *vs.* SILAS W. ELLIOTT.

1. If a parent die leaving a will, and a slave put into the possession of a child, be not disposed of in it—that is, should the parent die intestate as to such slave, whether the case would be within the proviso of the act of 1806, 1 Rev. Stat., ch. 37, sec. 17, so as to make the gift good, *quere?*

2. Where a testator, who had upon the marriage of his daughter E. placed a negro woman, Fanny, in her possession, bequeathed as follows: "I lend unto my daughter E. two negroes, named Fanny and Luke, during her natural life, and their increase. Fanny is now in her possession. Luke she is to receive after my decease—and if she should never have a lawful heir begotten of her own body, for them and their increase to be returned to my five children," &c: *It was held* that the children of Fanny, born

whilst she was in the possession of the daughter and her husband, but before the death of the testator, passed under the bequest to the daughter.

3. The case of *Bullock* v. *Bullock*, 2 Dev. Eq. Rep., 307, approved.

This was an action of DETINUE, for two negro slaves by the names of Isaac and Esther, tried at Chowan, on the Fall circuit of 1839, before his Honor Judge NASH.

The plaintiffs claimed the slaves in question as executors of Harman Hurdle, under whom the defendant claimed; and, it appeared upon the trial, that the defendant, some years previous to the testator's death, intermarried with his daughter, Elizabeth; that upon the said intermarriage, the testator delivered to the defendant and his wife a negro woman slave named Fanny; that the slaves, for the recovery of which this suit was brought, were the children of Fanny; and that they were born whilst their mother continued in the possession of the defendant; that upon said slave Fanny being delivered to the defendant and his wife, they took her to their home, and had continued in possession of her and her increase ever since. By his will the testator bequeathed as follows:

"I lend unto my daughter, Elizabeth Elliott, two negroes named Fanny and Luke, during her natural life, and their increase. Fanny is now in her possession—she is to receive Luke after my decease—and if she never should have a lawful heir begotten of her own body, for them and their increase to be returned to my five children, namely, Hardy, Joseph,
(175) William and Lemuel Hurdle, and Sarah Blanchard—
and if ever she should have a lawful heir, or heirs begotten of her own body, for them to have the two aforesaid negroes and their increase forever."

It was admitted that the negro woman Fanny, mentioned in the bequest, was the negro delivered by the testator to the defendant, as above stated; and also, that the plaintiffs, after the testator's death, which took place in 1838, demanded the slaves in controversy, before the commencement of this action.

It was insisted, by the defendant's counsel, that by the will of the testator, no disposition was made of the slaves inconsistent with the possession of the defendant; and that there being nothing in the will that will indicate a disposition on the part of the testator to change the possession of the slaves, the plaintiffs were not entitled to recover. His Honor charged the jury that the bequest operated as a revocation of the advancement; and that the plaintiffs were entitled to recover.

The plaintiffs, under this charge, had a verdict and judgment, and the defendant appealed.

M. Haughton, for the defendant, referred to the cases of *Reno's Ex'rs* v. *Davis & Wife*, 4 Hen. & Mum., 283; *Kenan* v. *Roberts*, 1 Wash. Rep., 107; *Davis* v. *Miller*, 1 Call's Rep., 127; *Shelton* v. *Shelton*, 1 Wash. Rep., 56.

A. Moore, for the plaintiff, submitted the case without argument.

RUFFIN, Chief Justice. The defendant's case requires him to establish two points. First, that the will contains no disposition of the negroes in dispute; for if it does, then the assent of the executor is wanting. Second, that as there is no such disposition, the issue of Fanny does not vest in the executor *virtute officii*, but belongs to the defendant as an advancement under the act of 1806, 1 Rev. Stat., ch. 37, sec. 17.

The last, as a general question, is an important one, and merits much consideration. We do not, however, propose to discuss it, much less to decide it, in the present case, as our judgment will be for the plaintiff upon the first point. For this reason, we should not think it necessary to notice the doubt upon the act of 1806, did not the question so plainly
(176) present itself in the case as to render total silence on it liable to be mistaken for acquiescence in a *dictum* found upon it. There has certainly been no direct adjudication on the point. But in *Stallings* v. *Stallings*, 1 Dev. Eq. Rep., 298, it fell *obiter* from a most respectable and reflecting Judge, that if there be a will, and a slave, put into the possession of a child, be not disposed of in it—that is, should the parent die intestate *as to it*, the case would still be within the proviso, so as to make the gift good. As the parent there died without making a will at all, there was nothing to call for those observations. Nor do we know, that either before or since, a remark has fallen from any other member of the Court, to indicate an opinion that any thing short of a dying *without will* would satisfy the words of the act—"he or she dying intestate." Certainly, the objections to the doctrine of a partial intestacy being within the act, are not few nor trivial. There is, in the first place, the intestacy mentioned in the act, without qualification. Next, the act speaks only of such parole gifts as may grow into *advancements* upon the death of the parent; and there is no such thing as advancement or hotch-pot in personalty upon a partial intestacy. Besides, if the gift be good because the will does not dispose of

the slave, then it must be good so far as by the will the slave is not disposed of. Suppose, then, for example, that a father put a negro into his son's possession, and then by his will give the negro to his son for life, and does not limit over the remainder: is the son to have the remainder by force of the act, in opposition to the clear intent to the contrary, and the express limitation for life? These are some of the obstacles in the way of the construction, intimated in *Stallings* v. *Stallings*, which induce the Court to invite discussion on it, as an open question, when its determination may be necessary to the decision of a cause. Perhaps such discussion may commend the doctrine to our adoption; but at present we feel obliged to say, that as there has been no adjudication on it, we shall willingly hear all that can be said on either side of it. This we say with the less hesitation, because Judge HENDERSON himself afterwards, in *Bullock* v. *Bullock*, 2 Dev. Eq., 307, notwithstanding some indistinct
(177) expressions similar to those before used by him, finally places his opinion upon the ground that the will carried the increase to the testator's daughters, Susan and Lucy. He refers, indeed, and properly enough, to the act of 1806; but it is only as a guide to the testator's intent, in aid of the Court, in putting a construction on the will giving to it something of the nature or meaning of a confirmation. He does not intimate that those persons could take the increase, by force of the statute, as advancements. Unquestionably they could not; for if they did not pass under the bequest to the daughters, with the original stock, they must have been included in the residuary clause, which was found in that will. There was not even a partial intestacy there; and, consequently, the Court looked anxiously through the whole will, to ascertain the intent, that the daughters should take the increase born in their possession.

Our decision in the present case, is formed upon the same ground—and much upon the authority of *Bullock* v. *Bullock*. We think the negroes sued for, are disposed of in the will; and, consequently, that the plaintiff must recover, as his assent to the legacy does not appear. In the case just mentioned, the testator gave to his daughters the negroes, stocks of horses, cattle, household goods, &c., which he put into their possession respectively upon their marriage. The will was silent as to the increase. Yet it was held, that the issue born in the possession of the daughters, in the life time of the father, passed; because the reference to the possessions of the daughters shewed the testator meant them to take as from the delivery of the possession. Here

the language is still stronger; for, besides referring to the possession, the will, in connexion with that reference, expressly mentions the increase. "I lend unto my daughter E., two negroes, named Fanny and Luke, during her natural life, and *their increase.* Fanny is now in her possession. She is to receive Luke after my decease." The word "increase," is not unequivocal. Generally speaking, indeed, it carries only issue born after the death of the testator; yet sometimes it has carried that born after the date of the will; and it may even take that born before the
(178) date of the will, upon the apparent intent. We have not the whole of this will before us; and, therefore, cannot say what might be collected from other parts of it. But, upon the words of this clause, and the facts stated in the case, we think the testator intended to give all the issue Fanny had, from the time he delivered her to his daughter. Why else did he make a reference to her possession? It was not necessary, for the purpose of identifying the negro; which was sufficiently done by her name. He had a different thing in his mind, in mentioning the possession of that negro; which was, to date the period from which the benefit of the gift should commence; for, he goes on to say, as to the other negro, "she is to *receive* him *after my death.*" Undoubtedly we are to collect from this, that it was the purpose of the testator, unless he should revoke his will, to treat Fanny as his daughter's, *before his death;* and that she should, at least, have the issue born after the making of the will. If so, we think we must hold, from the reference to her possession, that the effect of that is to be carried back to the time the possession was acquired. This is, in some degree, confirmed by the improbability that the testator intended these two small children to be separated from their mother; and yet more so, by the circumstance that, whether effectually or not, is not material to this purpose, he gives over to his other children all he gives to the daughter, including the mother and issue, upon the death of the daughter, without having "a lawful heir begotten of her body."

We think, therefore, the plaintiff is entitled to recover at law; though, unless the slaves be wanted for the purpose of paying debts, the defendant may, in another forum, claim them as a part of his wife's legacy.

PER CURIAM. — Judgment affirmed.

(179) JAMES D. NEWSOM *vs.* WILLIAM ROLES.

1. An absolute bill of sale for slaves, accompanied with a parole contract between the parties that the vendor might redeem or re-purchase the slaves by re-paying the same price, is not void as against the creditors of the vendor under the act of 1820, 1 Rev. Stat., ch. 37, sec. 23, or the 13th Eliz., 1 Rev. Stat., ch. 50, sec. 1, when it is admitted that the sale was not, and was not intended to be, a mortgage, but was *bona fide* absolute, and for a fair price.

2. The case of *Gregory* v. *Perkins*, 4 Dev. Rep., 50, distinguished from this and approved.

The plaintiff, Newsom, sued out an attachment against the defendant, Roles, and had it levied upon several slaves, as the property of Roles, but which were then in the possession of one Samuel Harris; whereupon Harris filed an interplea, in which he claimed the slaves as his own. An issue was thereupon made up between the said Harris and Newsom, the plaintiff, in the attachment, to try whether the said slaves were the property of the said Harris, the interpleader, or of the said Roles, the defendant in the attachment; which issue was tried at Franklin, on the last circuit, before his Honor Judge NASH.

On the part of Harris, a general power of attorney from Roles to one John L. Terrell, dated the 1st December, 1838, was produced and proved; and it was also proved, that the said Harris, before the suing out of the attachment, to wit, on the 2d of April, 1839, purchased the slaves in question of the said John L. Terrell, at the price of $1,225—paid the purchase money, and the slaves were delivered to him by Terrell, who, at the same time, executed and delivered to him an absolute bill of sale, of that date, for the said slaves. The plaintiff, Newsom, thereupon, called as a witness the said John L. Terrell, who deposed that Roles, being about to go to the south western country, to attend to affairs there, of importance to him, executed the power of attorney aforesaid, in order to make the witness his general agent, during his absence; that while he was so absent, the witness found the state of Roles's affairs here, to be such, that a sale of his property might be necessary before his (180) return, wrote to him to that effect, and was, in reply, directed by him, that if he had to sell these negroes, as they were favorite slaves, and he, Roles, expected so to arrange his affairs in the south west as to enable him to save the slaves, he, witness, should reserve a right to Roles, to redeem or re-purchase them. That afterwards, Harris, who was a surety of Roles to one Alston, in a bond for $1,000, applied to the witness as Roles's agent, to do something for his security; and proposed

to take bonds for that purpose. This being declined, Harris proposed to purchase the negroes in question, and the witness agreed to sell them to Harris at the price of $1,225; that being the value of the negroes, as stated in a memorandum of Roles, and being, in the opinion of the witness, a full and fair price for them; that the price was paid as follows, to wit, $1,000 paid to discharge the bond to Alston—by discharge of $93.18 cts. due from Roles to Harris on a bond; and by the payment to the witness of the balance, to wit, $131.82 cts.; and the negroes were delivered, and the bill of sale executed, as before stated; that in the contract of sale between the witness and Harris, it was expressly agreed that Roles should have the privilege to redeem or repurchase the slaves, if he chose, by repaying the same sum to Harris; that witness, without such reservation, would not have felt at liberty, under his instructions, to sell, and would not have sold, the said slaves to Harris. Being cross-examined, the witness further proved, that no mortgage was intended; that it was a sale of the negroes to Harris; that as soon as it was completed, the relation of debtor and creditor, or surety, ceased between Harris and Roles; that the negroes were entirely at Harris's risk; that Roles was under no obligation to redeem or re-take the negroes; but that the sale was an absolute one, except the privilege to Roles, at his option, merely to repurchase the slaves.

The plaintiff, Newsom, also proved the debt on which his action was brought, and it was admitted that it was a debt fairly owing from the said Roles.

The plaintiff's counsel, admitting that the transaction aforesaid, between the said Harris and Terrell, was, in fact, *bona fide*, and was not, in law, a mortgage, nor designed as
(181) such, nevertheless insisted that, in law, the title to the said slaves did not pass to Harris as against the creditors of Roles, and that the jury ought to find the issue against Harris on his interplea; and thereupon a verdict was taken by consent for the plaintiff, Newsom, on the said issue, subject to the opinion of the court, upon the matters above stated, as a case reserved; and judgment to be entered upon the said interplea (notwithstanding the said verdict) according to the opinion of the court; and the court being of opinion thereupon for the plaintiff, Newsom, a judgment was rendered for him, and the interpleader, Harris, appealed.

Badger, for the interpleader, Harris, contended that the Judge was misled by general expressions, in the case of *Gregory* v. *Per-*

kins, 4 Dev. Rep., 50, and argued to shew that there was an essential difference between mortgages and conditional sales, *Poindexter* v. *McCannon*, 1 Dev. Eq. Rep., 373.

W. H. Haywood and Battle, for the plaintiff, Newsom, relied upon the case of *Gregory* v. *Perkins*, and contended that the right to re-purchase the slaves was a valuable right in Roles, to the benefit of which his creditors ought to be entitled; and that, as it was not inserted in the deed, so that it might be registered with it, the deed was void as against the creditors of Roles. They also referred to, and commented upon, the cases of *Poindexter* v. *McCannon*, *ubi supra*, and *Munnerlin* v. *Birmingham*, 2 Dev. & Bat. Eq. Rep., 358.

RUFFIN, Chief Justice. There is no reason, we think, for impeaching the conveyance to Harris. He paid the full value of the slaves, not as a loan, but as the price upon a purchase, and took a deed and immediate possession. It is true, there was a verbal agreement or understanding, that Roles, upon his return, might "redeem or re-purchase." But it does not follow, that before his return, a creditor might attach and sell the negroes. The plaintiff's counsel admitted at the trial, that the transaction was *bona fide*, and was not a mortgage, nor intended to be so.

(182) It appears to us, that those admissions are decisive against this action. Had there been in realty a mortgage, with a parole proviso, for redemption, properly speaking, then, as that would have been in evasion of the act of 1820, 1 Rev. Stat., ch. 37, sec. 23, the deed would have been void. *Gregory* v. *Perkins*, 4 Dev., 50. But, as contradistinguished from a mortgage, this transaction has every feature of a sale and conveyance, accompanied by a parole agreement for a re-sale at the same full price, at the election of the first owner. *Poindexter* v. *McCannon*, 1 Dev. Eq., 373. Indeed, that follows from the admission, that a mortgage was not intended. The counsel for the plaintiff insists, however, that if the transaction be in its nature a contract for the re-sale of the negroes, it is fraudulent and void as to the creditors, because there is, as he says, a valuable interest in the debtor, not reserved openly in the deed, but resting in confidence between the parties. For these positions, the case of *Gregory* v. *Perkins*, is the authority. But that case has in view, throughout, only those conveyances, which, whatever be their form, are intended by the parties *as securities:* upon which, if the instrument set forth the true and whole agreement, *the property*, in the view of a Court of Equity, is deemed to be all along in the apparent vendor, though liable as a security,

for a sum of money to the apparent vendee. In other words, that case treats of such transactions as seem to the world to be real sales; but are, as between the parties, secretly mortgages, or *in the nature of mortgages*. But, the present is a transaction of a different kind. There might possibly have been a dispute—though a very slight one—whether this were intended as a security or not. But when it is once ascertained that it was not so intended, and that it is fair and honest in its present form, it follows that neither the act of 1820, nor of 13 Eliz., 1 Rev. Stat., ch. 50, sec. 1, can touch it. The omission of any provision for a re-sale, in writing, does in no manner prejudice the creditor; for if it had been inserted, it would not have vested in Roles a property in the slaves, which the creditor could reach either at law or in equity. It is to be recollected, that if it had been put into the deed, it would not have made it a mortgage; for that was not intended; and, consequently, we must
(183) say, it should not have that effect. It was not, therefore, a conditional sale; but was a sale with a fair stipulation to re-sell. That differs not at all from an ordinary contract to sell. Both constitute executory personal contracts, and are merely *choses in action*. The party alone can enforce the contract, and not his creditors; and even the party can claim the benefit of it only by a strict observance of the time, and every thing else to be done on his part—as to which, nothing appears in this case.

The judgment must, therefore, be reversed; and, under the agreement of the parties appearing in the record, there must, notwithstanding the verdict, be judgment in favor of Harris upon his interplea.

PER CURIAM. Judgment reversed.

CELESTIA A. TILLMAN *vs.* ELIAS SINCLAIR.

1. A limitation in a deed, by a donor, of slaves to himself for life, "and after his death, in the event of his having no heirs," to his niece, is, by the operation of the act of 1823, 1 Rev. Stat., ch. 37. sec. 22, in connection with that of 1827, 1 Rev. Stat., ch. 43, sec. 3; or, by the former, and the principles of the common law, independent of the latter act, valid, and vests a title to the slaves in the niece, upon the death of the donor without children.

2. A bequest by a testator, "in the event of his having no heirs," to his niece, is good at common law, and vests a title in the niece, if the testator die without children.

TILLMAN *v.* SINCLAIR.

This was an action of DETINUE, for three negro slaves, named Beck, Eli and Enos, tried before his Honor Judge BAILEY, at Montgomery, on the last circuit.

It was admitted that the defendant was in possession of the slaves in question, as the administrator of Howell Harris, Junior. The plaintiff claimed the said slaves under the following instrument, which was offered in evidence:

"Know all men by these presents, that I, Howell Har-
(184) ris, Jr., of the county of Montgomery and State of North Carolina, for and in consideration of the natural love and affection which I have for my niece, Celestia Ann Tillman, daughter of John and Eliza Tillman, do give, grant and convey to the said Celestia Ann Tillman, the following negroes, to wit: one negro woman by the name of Beck, and her child Eli; and one negro boy named Enos. The condition of this deed of gift is such, that the aforesaid negroes are to remain in the possession of him, the said Howell Harris, Jr., during his life time; and the monies arising from the hire of the said negroes, are to be collected for his use and benefit; and, after his death, in the event of his having no heirs, then, in that case, the aforesaid Celestia Ann Tillman to have and to hold the said negroes, Beck, Eli and Enos, against the claim or claims of all persons whatsoever. In witness whereof the said Howell Harris, Jr., hath hereunto set his hand and seal, the 16th of November, 1836. HOWELL HARRIS, SEAL.

WITNESS, FAR. MARTIN,
MARY HARRIS."

There was a dispute, on the trial, whether this instrument had ever been delivered—as to which several witnesses were examined—but it is unnecessary to state their testimony, as all the points made on the trial were abandoned in the Supreme Court, except that relating to the construction of the instrument; as to which the defendant insisted that the limitation contained in the deed was too remote, and did not vest a title in the plaintiff. But his Honor, being of a different opinion, charged the jury that the instrument did vest a title to the slaves in the plaintiff. The jury returned a verdict for the plaintiff; upon which she had judgment, and the defendant appealed.

Badger for the defendant.
Mendenhall and *Winston* for the plaintiff.

RUFFIN, Chief Justice. We have had no hesitation in adopting the construction of the deed in favour of the plaintiff.

By the act of 1823, Rev. Stat., ch. 37, sec. 22, a limita-
(185) tion by deed of slaves to one in remainder, after a reservation to the donor for his life is unquestionably good; because, had it been a bequest for life from another person to this donor, and then over, it would, in 1823, have been effectual. But it is said, that in the present case it is different, inasmuch as this is a limitation, not merely after a life estate in the donor, but "after the death of the donor, having no heirs;" because, at the making of the act, a gift over by will was void, which was limited to take effect upon the death of a first taker "without heirs," or "having no heirs;" and this deed is not helped by the act of 1827, 1 Rev. Stat., ch. 43, sec. 3, for the reason, that the act of 1823 only makes good such limitations by deed, as were then good by way of executory devise.

We see no reason for thus restricting the operation of the act of 1823. It is a remedial and beneficial act, relating to limitations of a species of property, in which consists a large portion of the substance out of which our citizens make family provisions and settlements. It ought, therefore, to be construed with a liberality which will admit all those modifications of interest in the property, which the heads of families ususally desire, and the interests of the whole family may require, as far as the words will allow the court to go. The general purpose of the Legislature may be plainly seen. It was, to authorise whatever might be done by will, to be done also by deed. Why should it be supposed that the Legislature meant such things only as might, at that time, be done by will? If, afterwards, it was thought proper to render, by statute, a limitation by will good, which then was not good, for the same reason, while the act of 1823 is left in the statute book, it would seem that the Legislature must wish, and have designed, that a like limitation in a deed should operate effectually. There could be no motive for tying down the law of 1823 to the very moment of its enactment. On the contrary, the sound construction of the act seems to be, that only one thing is requisite to bring a case within it—and that is, that the deed should be "thereafter made." If it be, and at the time of the making of the deed, its provisions, if contained
in a will, would in law be good, so shall they be in
(186) the deed. Neither the object nor the language of the Legislature can be otherwise satisfied.

Then, applying the act of 1827 to this question, it puts it beyond doubt. The act does not, indeed, use these very words, "having no heirs;" yet they are equivalent to those found in it,

which are mentioned but of examples of a class of phrases then in the minds of the law-makers. As the means of ascertaining the event on which a slave is to go over, and the period within which that event must occur, if it occur at all, the effect of the act is to make the popular acceptation of all such expressions as those enumerated in it, their legal signification in future, instead of that which had previously prevailed: so as to give the thing to the first taker absolutely, if he leave a child surviving him; or, if the first taker leave no such surviving child, to give the thing then to the remainder man absolutely.

But without such a construction of the act, and supposing that of 1823 not to have within its purview devises rendered valid by subsequent enactments; yet we think the provisions of the deed before us might be supported, independent of the act of 1827, upon a principle of the common law. This disposition is by one not having a child at the time, and to take effect in default of heirs—not of a devisee or of any third person, but of the donor himself—it is plain from the fact, that the donee is stated in the deed to be the niece of the donor, that the term "heirs" here means children, or issue, or heirs of the body. It is perfectly clear, when the limitation in a will is upon the failure of *the testator's own issue*, that the intention must merely be to create a contingency, on which the legacy will take effect *at the death of the testator*, if there then be no issue. A testator means, in such a case, to say, "this is my will on condition, or provided I leave no child of my own; but if I leave a child, then of course I shall not wish to give my property away from him, and this shall not be my will." The cases upon this subject, from that of *French* v. *Caddell*, 3 Bro. P. C., 257, down to that of *Sanford* v. *Irby*, 3 Barn. & Ald., 654, are collected in 2 Pow. Dev., 567, Mr. Jarmin's edition; and they clearly establish the rule here laid down.

(187) Upon the other points stated in the record, the counsel for the defendant properly, as we think, yielded the case; and upon the whole, therefore, the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

HAMILTON HESTER *vs.* BENNETT HESTER.

The costs which the act of 1818, 1 Rev. Stat., ch. 4, sec. 26, requires to be taxed double, against a party who appeals to the Supreme Court, and fails to carry up and file the record in proper time, are only those of the Supreme Court.

This was a RULE, to shew cause why an execution should not be set aside, and satisfaction entered of the judgment on which the same was issued, submitted to his Honor Judge DICK, at Granville, on the last circuit, upon the following statement of facts:

An issue was made up in the County Court of Granville, between Bennett Hester and Hamilton Hester, to try whether a paper writing, offered for probate, was the last will of Benjamin Hester, deceased. This issue was tried in the County Court, and an appeal taken from the judgment rendered in that Court to the Superior Court, where it was tried, at September Term, 1838, and a verdict being found in favor of the will, the said Hamilton obtained an appeal to the Supreme Court, and failing to file the transcript in the clerk's office of that court, within the time limited by law, the said Bennett procured a certificate of the failure, filed it in the office of the clerk of the Superior Court, and demanded an execution for double costs, according to the Act of Assembly, concerning appeals to the Supreme Court, (1 Rev. Stat., ch. 4, sec. 26.) An execution was accordingly issued for double the whole costs in the County and Superior Court, amounting to the sum of $672.94 cts., which was the execution referred to in the above rule. The said
(188) Hamilton paid to the sheriff the sum of $366.47 cts., being the amount of the single costs $336.47 cts., and $30 as the double of the usual amount of costs upon appeals, in the Supreme Court, and, insisting that the costs to which he was justly liable were thereby satisfied, obtained this rule. The said Hamilton, by his counsel, insisted that the costs which were to be doubled, were those of the Supreme Court, and as he had paid such amount, he claimed to have his rule made absolute, without any further payment; and if this construction be in law the true one, it was admitted that the payment was in full of the costs, and the rule should be made absolute. But the said Bennett denying that to be the construction, insisted that the costs to be doubled were all the costs of the two courts, (except the fees of the witnesses for the said Hamilton,) which are as follows:

Single costs in the County Court		$96.19
Court or officer's costs in that court		81.95
Witness of the said Bennett, in the issue in that court		10.88
		$189.02
Single costs of the Superior Court	$240.08	
Court or officer's costs in that court	53.10	
Witnesses of the said Bennett, in the issue in that court	121.48	
		$414.86
Making amount of costs for which execution should be		$603.88
And as the sum paid was only		$366.47
Therefore there should be the further sum of paid on the execution.		237.41

And the said Bennett further insisted, that if this should not be correct, then the court costs of both courts should be doubled as follows:

Single costs of both courts		$336.47
Officers, or court costs of the County C't.	$81.95	
Do do of the Superior C't.	53.10	
		$135.05
		$471.52

(189) And then there should be paid the further sum of $105.05 cts., in addition to the payment already made. And the said Hamilton insisted that if his construction as above were not correct, then he contended that the costs to be doubled, were costs taxed in the Superior Court, and consequently they were only the costs incurred in that court, and not in the County Court—and if so, they must be computed as follows:

Single costs of both courts	$336.47
One-half the officers costs of the Superior Court	26.55
	$362.92

And so the execution was satisfied by being overpaid—or else thus:

Single costs		$336.57
Half officers' costs	$26.55	
Half taxed witness costs	60.74	
		87.29
		$423.76

And then the execution would be satisfied by the payment of the additional sum of $57.29 cts.

And it was agreed that his Honor should direct satisfaction to be entered upon the execution, either without further payment, or with such further payment as upon either of the foregoing views should seem to him to be just, or to order such other payment, or give such other directions in the premises touching the re-taxation of the costs, setting aside the execution, or causing satisfaction of the judgment to be entered, as to him should seem meet and proper.

And thereupon his Honor, being of opinion that the costs contemplated by the statute to be doubled, were the costs for which judgment passed in the Superior Court, (no matter in which court the said costs may have accrued,) excluding therefrom the witness tickets, declared that the true sum for which the execution should have issued, was . . . $471.52
from which deducting 366.47

the sum paid, there remained due . . $105 05

(190) and ordered, that upon the payment into Court, to the use of the said Bennett, of the said sum of $105.05, the execution should be superseded, and satisfaction entered of the judgment—and should the same not be paid, then it was ordered that the clerk should tax the costs according to this opinion, at $471.52, and issue execution therefor, giving credit thereon for the said sum of $366.47 cts. already paid; from which judgment the said Bennett appealed to the Supreme Court.

Badger for the appellant.
No counsel appeared for the other party in this Court.

RUFFIN, Chief Justice. If the party appealing to this Court do not bring up the record, the appellee may, by the act of 1818, 1 Rev. Stat., ch. 4, sec. 26, either file it or obtain a certificate of the Clerk of the appellant's failure; and upon that certificate being filed with the Clerk of the Superior Court, he is to record it, "and then issue execution on the judgment rendered in the Superior Court, as though no appeal had been prayed, taxing double costs against the appellant."

This case turns on the meaning of that act—the question being, what costs the Legislature intended to be doubled?

His Honor thought them to be all the costs for which judgment had been rendered in the Superior Court, including those incurred in the County Court—excepting those incurred for wit-

nesses. He ordered accordingly; and the party claiming the double costs appealed to this Court.

The act is not express as to what costs, or as to the costs of what Court or Courts the clerk is to tax double. The meaning is, therefore, to be collected as well as we can by construction. There are two considerations applicable to the question; by the one or the other of which, as it seems to us, the true interpretation must be determined. The one is, that the Legislature contemplated the costs for which judgment was rendered in the Superior Court; because they are ascertained by adjudication, and that judgment is to regulate the clerk of that court in issuing the execution. The other is, that the costs within
(191) the purview of the act, are those incurred by the appellee, by reason of the appeal which the other party abandons. The judgment in the Superior Court upon this motion, proceeds upon neither of these principles. It rejects the latter altogether; and adopts the former in part, but does not follow it out. If the judgment in the Superior Court determines the costs in question, then the attendance of witnesses must be included, as well as the fees of attorneys and officers. For, those persons do not receive the moneys adjudged on their account; but the party to the suit recovers back what he has paid to them, and those sums are doubled and adjudged for his benefit. The act has no exception as to the witnesses; and there is no more reason for saying that the party may double the payments to the sheriff, clerk and attorney, than that he may do the same with the payments to his witnesses. The decision in the Superior Court cannot, therefore, be right; but must be either for too much or too little. It departs from its own principle. It remains, then, to consider which of those two principles is to govern the construction; and, in our opinion, it is the latter. We are led to this conclusion by looking to the mischief in the contemplation of the Legislature; the reasonableness of the remedy upon the one exposition or the other; and the provisions of the other acts *in pari materia*.

The mischief is that of taking frivolous and dilatory appeals, without the intention to prosecute them; whereby the appellee may be unnecessarily put to costs. It was fit the Legislature should attempt to prevent that, by such a penalty as would probably correct the evil. But, while we would expect it to be generally effectual, we should also expect it not to be ruinous, perhaps, to one side, and to confer an unmerited bounty on the other. On the contrary, we should anticipate that it would be reason-

able in amount; and, especially, such as would operate with uniformity, or nearly so, not only on all persons incurring it, but also in amount to each person who should incur it. The enormity of the forfeiture is, of itself, a strong argument against doubling the costs adjudged in the Superior Court; which may include costs in the County Court, although the appeal from that Court was prosecuted in good faith. It is a penalty far
(192) beyond the default in many cases, and ought not to be adopted, if more moderation will satisfy the words of the act. Besides, there is another circumstance entitled to much weight on this question. The default is the same in each appellant who fails to file the transcript, and who, therefore, ought to be visited with the like mulct. But upon the construction claimed for the appellant in this case, the penalty will vary with every case; and that not slightly, but with extreme differences. It is not respectful to attribute such hard and partial purposes to the Legislature. On the contrary, there seems to be much reason for laying such a penalty as will induce a party not to appeal frivolously, and as will indemnify and fully indemnify the appellee out of the appellant, for all the inconveniences arising to him from such an appeal. This is sufficiently done by doubling all the costs to which the appellee has been put *by the appeal;* which, in this case, are the costs incurred *in the Supreme Court*, by employing an attorney to represent him here, and by getting the clerk's certificate, as required by the act. The costs of this court are those, therefore, within the purview of the act, as we think. Upon that construction, the same forfeiture is incurred by every person committing the same default.

There is another thing, leading to the same conclusion, not less cogent than those mentioned. In the Revised Statute, "concerning appeals," c. 4, sec. 6, it is provided, that upon appeals from the County Court, the appellee may file the transcript, "and, on motion in the Superior Court, the judgment of the court below shall be affirmed with double costs, to be paid by the appellant." What costs are meant in this part of the act? Upon the appellant's own hypothesis, they are those of the Superior Court, because the judgment for them is given in the Superior Court. No doubt those are the costs; but not for the reason given. That section of the act is taken from the Court Law, 1777, Rev. ch. 115, sec. 77; which, after directing the appellant to file the transcript fifteen days before the sitting of the court, enacts that if he do not file it, "the judgment of the County Court shall be affirmed, and the appellant shall pay

double cost *in the Superior Court.*" This explicit pro-
(193) vision renders the whole policy of the Legislature, upon questions of this sort, clear; and requires us to receive similar expressions upon a kindred subject, though somewhat more vague, in a sense consistent with that policy. The double costs are not those incurred in the court *from* which the appeal was taken, but those in the court *to* which it is taken. Neither the language of the law, nor the purposes of justice towards the appellee, require more.

To this it may be objected, that the execution will issue without a judgment to authorise it, and for costs of another court, which the Clerk of the Superior Court cannot know, nor have the means of ascertaining. But those difficulties are easily answered or obviated. Whether the costs be those of the Superior or Supreme Court, it is obvious that, in either case, the clerk issues the execution without, in form, the warrant of a judgment. In that respect, the case is, therefore, the same upon either construction. But the recorded certificate from this court, by force of the statute, stands in the place of, and is a judgment for, this purpose, in point of efficacy. The act does not, therefore, require the execution for double costs to be issued from the Superior Court, upon an idea that those costs are there adjudged by the court; but merely for convenience. Nor do we see much in the supposed difficulty in ascertaining the costs of the Supreme Court. A statement of them may be appended by the Clerk of this court to the certificate he must give of the appellant's default. They will consist only of his own fee, and that of the appellee's attorney, if he have one; and the act of 1798, 1 Rev. Stat., ch. 31, sec. 62, furnishes an easy method to either clerk, of establishing the relation between the party and his attorney. Besides, costs in all cases are taxed by the clerk; and this, like every other taxation by him, is subject to re-taxation, upon the complaint of either party, as in the case before us. So there can be no danger of not ultimately arriving correctly at the costs incurred by the appellee, by reason of the appeal; the double of which, as we conceive, it was the purpose of the Legislature to give him.

Therefore the judgment of the Superior Court must be reversed, and a judgment entered on the rule in that
(194) court in conformity to this opinion. As that judgment will be less favourable to the appellant than that from which he appealed, he, the appellant, must pay the costs of this court.

PER CURIAM. 151 Judgment reversed.

Den on dem. of THE COMMISSIONERS OF THE TOWN OF BATH *vs.* WILSON BOYD.

When an act of the Legislature, after reciting that a certain tract of land adjacent to Bath town "was granted and surveyed for a common for the use of the said town, but the title thereof hath never been fully confirmed," declared "that the said land shall be, and hereby is appointed a common to lie perpetually for the use and benefit of the inhabitants of Bath town, under such restrictions and regulations as are or shall be appointed for town commons; and that the inspection and immediate care of looking after the said common be in the commissioners of the said town for the time being." *It was held* that the tract of land itself, and not a mere right of common in it, was thereby granted to the inhabitants of Bath town, to be held for a town common; and this especially where it appeared that a subsequent act provided "for fencing the town of Bath, and re surveying the common *belonging to the said town.*" And *it was further held* that if the inhabitants of Bath town were not a corporation before, the act *ipso facto* created them a body politic for the purpose of that grant; and that a subsequent act continuing their corporate existence under the name of "the commissioners of the town of Bath," enabled them to maintain an action of ejectment for the said land in that name.

This was an action of EJECTMENT, for a tract of land, tried at Beaufort, on the last circuit, before his Honor Judge TOOMER.

The lessors of the plaintiff, to shew title to the premises described in the declaration, gave in evidence an act passed in the year 1729, entitled "an act to confirm Bath town common," contained in Martin's collection of the private acts, page 5; and another act in the same collection, page 9; passed in the year 1745, ch. 11, entitled "an act for fencing the town of

(195) Bath, and re-surveying the common belonging to the said town," &c.; and also an act passed in the year 1834, Pamphlet act, page 80, entitled "an act for the better regulation of the town of Bath, in Beaufort county." The lessors of the plaintiff contended that the act of 1729 created a body corporate, and granted to that body the land described in the declaration; and that the rights of that body had been transmitted to them, the lessors of the plaintiff, by the aforesaid acts of 1745 and 1834, or by operation of law. The defendant insisted that no body corporate was created by the act of 1729; that the said act granted no land; that if any thing was granted, it was a mere right of common, an incorporeal hereditament, for the disturbance of which, this action could not be maintained; and that the lessors of the plaintiff had no right or title to the premises described in the declaration, and if they had any right, it would not support this action.

The jury returned a verdict for the plaintiff, subject to the opinion of the court, as to whether the lessors of the plaintiff had shewn any title, or could maintain this action; and his

Honor being of opinion against the plaintiff, set aside the verdict, and gave a judgment of nonsuit, from which the lessors of the plaintiff appealed.

J. H. Bryan, for the lessors of the plaintiff, contended that before the year 1729, the land was granted for the use of the inhabitants of Bath. The Lords Proprietors had a right to erect corporations and make grants, and however the grant was made, it created a corporation by implication, 4 Com. Dig., 470, Tit. Franchise; and it would be immaterial whether they took in the name of the inhabitants of the town of Bath, or the town of Bath, or the commissioners of Bath. The grant itself would create a grantee. The power given to the inhabitants of the town of looking after the commons, gives them an estate in the same, for the effectual performance of their trust. This case is within the reason of the case of *Shaw* v. *Kennedy*, N. C. Term Rep., 161; and it is analogous to the cases of a trustee, and of a guardian in socage. 1 Saund. P. & E., 560, and the authorities there cited. Having the care of the land, the commis-
(196) sioners must have the right to redress injuries. 3 Bac. Abr., 414, Tit. Guard. Coke Lit., 87 b. 88 a.; 1 Saund. Rep., 112.

No counsel appeared for the defendant in this court.

GASTON, Judge. By the act of 1729, entitled "an act to confirm Bath town common," it is recited "that a tract of land, the boundaries of which are particularly described 'adjacent to Bath town,' was granted and surveyed for a common for the use of the said town, but the title thereof hath never been fully confirmed," and it is thereby enacted "that the said land shall be, and hereby is appointed a common, to lie perpetually for the use and benefit of the inhabitants of Bath town, under such restrictions and regulations as are or shall be appointed for town commons; and that the inspection and immediate care of looking after the said common be in the commissioners of the said town for the time being." Upon this act an enquiry arises, is a grant thereby made to the inhabitants of Bath town of the tract of land itself to be held for a town common, or only of a right of common in the tract? that is to say, a right to feed their beasts or cut their wood thereon, or to have some other like profit therefrom. We adopt the first construction as most consonant with the words of the act, and best fitted to effect the object of the law-makers.

The recital is, that *the tract of land* had been granted and sur-

veyed for a common for the use of the town of Bath, but that the title thereof hath not been fully confirmed. The subject matter of legislation is, then, this tract of land so previously granted and surveyed. This mischief requiring legislative interference is, that notwithstanding these acts, the title, for what reason we know not, needs confirmation. The obvious remedy would be to confirm the title, by giving to it all the efficacy of a legislative grant. And such accordingly seems to be the enactment "that the *said land* shall be and hereby is appointed a common, to lie perpetually for the use and benefit of the inhabitants of Bath town, &c." There is not an expression in the act, from which it can be fairly inferred that the Legislature had in view that incorporeal right existing in idea and
(197) abstracted contemplation, which is called "the right of common," by virtue whereof one man or set of men is entitled to have a profit in the land of another. The term "a common," which is used in the act, is not appropriate to the expression of this incorporeal right, but is descriptive of the *land* itself, as devoted to public, instead of being appropriated to private, uses. By a town common, in common parlance, is understood an enclosed or unenclosed place belonging to the town, and in which no individual has a private property. If the purpose of the act had been to confer on the inhabitants of Bath this supposed incorporeal right, the nature and extent of the right would have been declared. Rights of common are of various sorts, as the right of feeding one's beasts on another's lands, of fishing in another man's water, of cutting necessary wood from off another's estate, or digging turf upon another's ground. Which of these is the right of common by this act intended to be *fully* confirmed? It would have been natural too, had such been the purpose of the act, to let it be known whose was the land that was to be subjected to these servitudes—who had accepted the grant made for these uses. Yet is the act entirely silent in this respect, and if this be its construction, we shall be obliged to hold, that the Lords Proprietors retained the dominion to themselves, subject to the exercise of this undefined right in the inhabitants of Bath. Now if this be so, what is the meaning of that part of the act which makes it the duty of the commissioners of the town of Bath to take care of this common? The property of it is in the Lords Proprietors—and the sole interest therein of those whom they represent, is one "existing in idea and abstracted contemplation." But if we follow the natural and obvious interpretation of the act, and hold it to be

a legislative grant of the land itself to the inhabitants of Bath as a town common, there is a manifest congruity in commending the immediate care of this property to the commissioners of the said town. The case does not set forth any legislative act or charter previous to the act of 1729, by which the inhabitants of Bath town had been erected into a corporation, and made capable of receiving a conveyance of lands, therefore whatever personal information we have on the subject, we cannot judicially know that such was the fact. But this is immaterial; for certainly, if the statute of 1729 contains a legislative grant to the inhabitants of Bath, it *ipso facto* creates them a body politic for the purposes of that grant. The statute confers a capacity to take (if it did not exist before) whatever it declares to be the will of the Legislature to confer.

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We think that the conclusion to which we are brought, by an examination of the language and of the object of the act of 1729, is corroborated by the legislative exposition of the act, in the subsequent statute of 1745. This is entitled "an act for fencing the town of Bath, and re-surveying the common *belonging to the said town*, &c., &c."; and, among other things, it enacts "that the common *belonging to the said town* shall be surveyed at the expense of the inhabitants of said town; and that proper landmarks shall be set on the bounds of the same, so that persons may know where the same are, and not commit trespass on the lands adjoining." Here is an explicit recognition by the Legislature—a recognition approaching, too, quite near in point of time to the legislative grant—that the tract of land called Bath Common was the property of the inhabitants of Bath town.

The act of 1834, "for the better regulation of the town of Bath, in Beaufort county," is an amended legislative charter, whereby the corporation of the inhabitants of Bath town, has its corporate existence continued with sundry modifications, under the corporate name of "the commissioners of the town of Bath," by which name it was thereafter to sue and be sued, and to have perpetual succession. We are led to this interpretation of the act, not so much by any one specific enactment, as by an examination of the whole of its numerous and detailed provisions, shewing that these were intended as a complete substitute for the few and imperfect provisions of former acts—and we are confirmed in the conviction of its correctness, by the absurdities which would result from intending two corporate bodies in relation to the same subject matter, the town of Bath—one, "the inhabitants of Bath town"—the other, "the commissioners of the town of Bath."

The case does not state affirmatively that the amended
(199) charter has been accepted or acted upon by the inhabitants of Bath. But in setting forth the objections made to the recovery of the plaintiff, it raises no question in relation to this fact. We must intend, therefore, that it was not disputed at the trial.

It is, therefore, the opinion of this court, that the tract of land in question was granted to the inhabitants of Bath town by the legislative authority of North Carolina, and by virtue of that grant became the property of the said inhabitants; and that the same is still the property of the said inhabitants, under their corporate name of the commissioners of the town of Bath.

According to this opinion, the non-suit must be set aside, and a judgment rendered for the plaintiff pursuant to the verdict of the jury.

PER CURIAM. Judgment reversed.

JOHN HOLT & CO. *vs.* GEORGE KERNODLE.

An agreement between two persons to carry on a certain trade, upon the terms that one of them is to contribute his labour, and the other to furnish all the materials necessary for the business, and to supply the labourer with provisions for himself and his family; and that out of the profits of the business, the materials and provisions are first to be paid for, and then the balance of the profits, if any, to be equally divided between the parties, constitutes them parties, and renders the labourer a necessary party in a suit brought for work and labour done in the course of the business, although previous to bringing the suit the parties may have dissolved the partnership, and separated before enough of profits were realized to pay for the materials and provisions; and the labourer may have left indebted to the other for the provisions furnished to his family.

This was an action of ASSUMPSIT, for work and labour done, commenced by a warrant before a single justice, and carried by successive appeals to the Superior Court of Guil-
(200) ford; where it was tried, on the last circuit, before his Honor Judge DICK.

The plaintiffs proved that they were the proprietors of a blacksmith shop, in which they had two slaves engaged; and that about the 1st of January, 1836, they employed a blacksmith by the name of John Willis, to work in the shop with the slaves, upon the following terms, which were not reduced to writing, to wit: The plaintiffs were to furnish the shop, coal, iron, and two slaves to work in the shop; they were also to furnish every thing else necessary to carry on the business, and likewise a house and provisions for Willis and his family. The

plaintiffs were first to be paid out of the profits of the business for the coal, iron and other materials furnished by them for carrying on the business, and also for the rent of the house Willis might live in, and for the provisions furnished his family, and then the balance of the profits, if any, were to be equally divided between the plaintiffs and Willis. The business was commenced and continued by the plaintiffs and Willis, from January, 1836, until some time in September or October of the same year, when they dissolved and separated, Willis being, as he stated, at that time indebted to the plaintiffs for articles furnished to his family. The declarations of Willis as to his indebtedness to the plaintiffs, were objected to by the defendant, but received by the court. It was admitted, by the defendant, that the work for which the warrant was brought, to wit, the ironing of his wagon, was done at the shop of the plaintiffs, in the year 1836; but he proved that, in the year 1834, Willis being pressed for money, agreed to iron his wagon for a certain sum, which the defendant then advanced to him; the wagon was accordingly sent to Willis, and remained with him unfinished, until he went to work with the plaintiffs, when it was carried to the plaintiffs' shop, and ironed as above stated. The defendant further proved, that on the trial of the warrant before the justice, he offered Willis as a witness to prove the above contract, when he was objected to by the plaintiffs, upon the ground that he was a copartner with them.

The defendant contended that Willis was a copartner, and ought to have been joined in the suit; and thereupon
(201) moved to nonsuit the plaintiffs. The court refused the motion for a nonsuit; but charged the jury that if they were satisfied from the evidence that Willis was to have a share of the profits of the shop from the beginning, he would be a necessary party to this suit; but if the contract was, that the plaintiffs were first to be paid for the iron, coal, provisions and house rent; and the shop, while Willis was there, had not realised enough to pay for the supplies furnished, but Willis had left the plaintiffs, indebted to them on that account, then he was not a necessary party to the suit. The court further instructed the jury, that although Willis might have taken the wagon of the defendant to the shop of the plaintiffs, and ironed it in pursuance of his contract with the defendant, in 1834, yet this would not deprive the plaintiffs of their right to recover, if they had no knowledge of such contract, and Willis not a partner at the time the work was done. The plaintiffs had a verdict and judgment, and the defendant appealed.

J. T. Morehead for the defendant. It is insisted, for the defendant, that the conclusion of law, upon the facts proved by the plaintiffs, creates the relation of partners between them and Willis; and the court should have nonsuited the plaintiffs. It is not essential to a legal partnership that it be confined to commercial business. It may exist between attorneys, conveyancers, *mechanics*, artisans or farmers, as well as between merchants and bankers. *Cooper* v. *Eyre*, 1 H. Black. Rep., 43. If one person advances funds, and another furnishes his services or skill in carrying on a trade, and is to *share* in the profits, it amounts to a partnership. *Dob* v. *Halsey*, 16 John. Rep., 54. It is sufficient that his interest in the profits is not intended as a mere substitute for a commission or brokerage. *Reid* v. *Hollingshead*, 4 Barn. and Cres., 867.

W. A. Graham for the plaintiffs. The agreement by a proprietor to pay a hireling a share of the profits, after reserving a certain part to himself, does not make such hireling a partner; or, at the most, he can only be regarded as such in liabilities to others, but he is not a necessary plaintiff. *Dry* v. *Boswell*, 1 Camp. N. P. Rep., 329; *Wish* v. *Small*, Ibid., 331, in note; *Benjamin* v. *Porteus*, 2 H. Black. Rep., 590; *Meyer* v. *Sharpe*, 5 Taun. Rep., 74 (1 Eng. C. L. Rep., 20); *Smith* v. *Watson*, 9 Eng. C. L. Rep., 122.

(202)

RUFFIN, Chief Justice. Of course this action cannot be sustained, if Willis was one of the firm of John Holt & Co.; and the opinion of the court is, that upon the plaintiffs' evidence, and much more on that of the defendant, Willis is to be taken to have been a partner; and the criterion on which the question was submitted to the jury, was altogether a mistaken one.

A partnership as between themselves, has been well said to be constituted by an agreement between two or more persons to join stocks of money, property or labour, and to divide the profits. But as to third persons, who may deal with the firm, a partnership may arise, upon a principle of public policy, so as to bind a person for all the liabilities of the firm, and, indeed, make him a party to all its contracts, although that person bring into the business neither effects nor services, but merely lend his name as a partner, or otherwise hold himself out to the world as such. There are numerous adjudications to the effect of these propositions; but the leading case is *Waugh* v. *Carver*, 2 H. Bla., 235, which sufficiently states both of them. The ordinary test, however, of a person being a partner, is his participation in the profits of the business; and we believe there can be no

instance imagined in which there is to be a participation in them, as profits, in which every person having a right to share in them, is not thereby rendered a partner to all intents and purposes. It is so between the parties themselves; because the one of them does not look to the other, personally, for restoring to him his capital, or remunerating him for his labour; but each looks to the assets or joint fund, for those purposes, and ascertains his interest by taking an account of the concern. Much more does sharing in the profits constitute a partnership as to the rest of the world; because, as was said by Chief Justice EYRE, by taking a part of the profits, the party takes from the creditors a
(203) portion of that fund, which is the proper security for the payment of their debts. It is also immaterial, whether the shares be much or little, *Rex* v. *Dodd*, 9 East., 527; for the question is, with what persons, as forming the firm, the contract was made, so as on the one hand, to make those persons chargeable with it, or on the other, enable them to enforce it. However small the interest one may have in the fund, or how remote soever that interest may be, provided it be an interest in the profits as such, he is thereby constituted a party to each contract of the firm, and must be joined in an action on it.

In the record, it is stated expressly, upon the plaintiffs' own proofs, that after defraying certain specified charges, "the balance of the profits, if any, were to be equally divided between the plaintiffs and Willis." This we think fatal to the present action; because it shews that Willis had an interest in the profits, not so large, perhaps, as that of the other parties, but as distinctly defined; that he looked to them and to them alone for his remuneration; and not to the present plaintiffs, under any circumstances.

His Honor, however, left it to the jury to find otherwise, upon the following distinction: That as the iron, coal, provisions for Willis, and rent, were, by the agreement, first to be paid out of the assets, if the jury believed that enough had not been made to pay those charges, but that Willis was indebted to the other parties, when he went away—then he, Willis, was not a necessary party to the suit. This distinction we deem entirely fallacious. It does not state that Willis would not be a partner in the case supposed; but only that he need not be a plaintiff. Now, he must be a party to the action, if he was a party to the contract; and he was a party to the contract, if, in point of law, he was a member of the firm when the contract was made. That he was a partner, has been already shewn; and, therefore, he was a necessary

plaintiff, unless, as laid down to the jury, it be true, that he ceased to be a partner; or, at least, a proper plaintiff, for the reason that, in point of fact, there was no surplus of profit in which Willis could share, after satisfying to his copartners their preferred charges. The idea is a novelty, and is, certainly, not correct. It would make the parties to every action (204) by a partnership depend on the accounts between the partners, which the jury is wholly incompetent to take. Besides, it would make the plaintiffs vary, from time to time, with the change of the fortunes of the firm. If, for example, at the time the work was done for the defendant, the business was a gaining one, so that, upon a division, some profit would have fallen to Willis, then he would have been a necessary party to an action then brought for the price: But, if afterwards, the business became a losing one, so that, upon a division, Willis would receive no share of the profit, then he need not be a party to the suit. This can only mean, that in this last case, Willis is not to be taken as continuing to be a party to the contract, although unquestionably, when made, it was entered into with him as one of the parties to it. The result to which we are thus brought, disproves the proposition from which it is deduced. Besides, it is an error to suppose that one who was a partner, has no interest in the fund, because, by reason of losses, he would draw no share upon a final settlement. The firm may owe debts, for which, of course, he is liable; and he is consequently a necessary party to actions by the firm, because he has an equal right with the other partners to receive the fund, that he may see it applied in exoneration of himself, in discharge of the debts.

At the bar, a class of cases was relied on to support the judgment, which we think do not apply. They are those of *Benjamin* v. *Porteus*, 2 H. Bl., 590; *Dry* v. *Boswell*, 1 Camp., 329, and others of that kind; in which it appeared, upon the agreement, that the parties intended an agency of the one for the other; and it was, consequently, held that there was not a partnership, although the agent was to be remunerated by wages in proportion to the profits, or even by a sum partly furnished by the profits. In some of those cases, the distinctions are very fine, and carried to a nicety at which even Lord ELDON expressed his regret. *Ex parte Hamper*, 17 Ves., 112, 404. It is not, however, needful that we should go through them; for they are all distinguishable from the present case, by the circumstances noticed by his Lordship: That in none of them did the party

agree for a part of the profits *as such*, so as thereby to
(205) entitle him to an account, but was to be remunerated according to the amount of *gross earnings or sales*, or *by the other contracting party*, in proportion to a given quantum of the profits. But in our case, there is no intent to turn Willis into a servant or agent; and he looked for compensation, not at all nor in any event to the other parties personally, but wholly to the funds of the concern, or, in other words, to the profits *as such*.

This point is decisive of the cause; and, therefore, it is useless to advert to the others made at the trial.

PER CURIAM. Judgment reversed and a *venire de novo*.

RULES.

The court finds it necessary to modify the rules of proceeding which were adopted the term before the last.

The clerk shall hereafter make out his docket so as to arrange all the causes, State, Equity and Law, according to the circuits from which they have been respectively brought, beginning with the 7th, and proceeding in inverse order to the first. And, unless a different arrangement be made by consent of the bar, as provided in the rules referred to, the causes will, after the 8th day of the court, be taken up in the order in which they may thus stand on the docket. It is nevertheless to be understood, that a State cause may be taken up out of its order, when the Attorney General shall require it; and that for special reasons, to be judged of by the Court, it may assign a particular day for the argument of any cause.

It is also ordered, that one notice of the taking of an account, in any cause pending in this Court, or making of any enquiry before the clerk thereof, or a commissioner for that purpose appointed, shall be hereafter deemed sufficient for proceeding thereon.

MEMORANDUM.

At a meeting of the Governor and Council, held at the Executive Office, on the 27th of August, 1840, WILLIAM H. BATTLE, of the City of Raleigh, and Reporter of this Court, was appointed a Judge of the Superior Courts of Law and Equity for this State, *vice* Judge TOOMER, resigned.

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA.

DECEMBER TERM, 1840.

(209) BENJAMIN ROSS & al. *vs.* HENRY CHRISTMAN & al.

1. Where there is any evidence of fraud or imposition in procuring the execution of an instrument as a will, the jurors are at liberty to consider the dispositions of property actually made therein, to guide their judgment in making up their verdict.
2. But where capacity in the testator, formal execution and volition all appear, no tribunal can pronounce against a will, because of its disapprobation, however strong, of the dispositions made by the testator.

This was an appeal from the judgment of the Court upon the verdict of a jury, on the trial of an issue, "*Devisavit vel non*," tried before NASH, Judge, at the Fall Term, 1840, of Guilford Superior Court of Law. The case was thus stated by the Judge.

Issue of "*Devisavit vel non*," to try the validity of George Christman's will. It was admitted that the deceased had full capacity to make a will, and that the paper in evidence was duly executed under all the forms required by law. But for the defendant it was contended that he did not know the contents of the paper now propounded as his will; that either the will was not written according to his directions, or this (210) paper had been fraudulently substituted for the true one. To sustain this defence, it was proved, that twenty years previous thereto a friend of the deceased, one Joseph Gibson, had written for him a will, in which he had given to his wife one half of his property during her life or widowhood, to be disposed of at her death as she chose, and the other half to his brothers and sisters; and by the widow it was proved that her husband had sent for Ross, one of the plaintiffs, to write his will; and that when Ross left, she went into the room, when the deceased handed her a paper and told her it was his will, which

Ross had written for him, and directed her to put it into a tin box in his trunk, which she did. She then asked him if Ross had read it to him, and he replied no; that both before and after that time he had told her he intended to give her all his property. The will was read to the jury, and its contents largely commented on by the defendants' counsel in support of their defence. On the part of the plaintiff it was proved that after the will was written by Ross, the old man had several times remarked that his will was yet to be executed, and that it must be done. The old lady proved this, and that, on the night previous to the execution of the will, he was taken very ill, so much so that it was thought he would not live till the morning; that he then expressed much anxiety as to having his will executed, saying if he died without signing it, it would have no effect. Before day light he dispatched a messenger for a neighbor, William Greeson, who got there before day, to whom the old man expressed his regret at raising him up so early, told him that he wanted him and another neighbor, Mr. Boon, to witness his will, that he had put it off too long already; that he then directed his wife to get his will. She went to the trunk and got out a paper. The old man requested witness to examine and see if it was a will, as his wife might have made a mistake. The witness looked at the beginning, and seeing it in the form of a will, told the old man so. The old man executed the will, and after Boon had come, for whom he had also sent, he again called for the paper, carefully folded it up, so that the witness could see only his name and the place where the witnesses were to
(211) sign, and said, I acknowledge this to be my last will and testament; and, after its attestation, requested his wife to put it back into his trunk, which was done. There was a difference between the witnesses as to the time when Ross wrote the will. The old lady said it was about a month before its execution; the subscribing witness said it was twelve or fourteen months before. The deceased had been sick for some length of time, and was seventy years old. The Court instructed the jury that in cases of doubted capacity, the contents of a will might prove important testimony; but since that question did not arise, as capacity was admitted, that the true question before them was, whether the testator, at the time he executed the paper propounded, knew its contents; that if he did, and with such knowledge executed it, intending it to be his will, and with the formalities required by law, it *was* his will; that as in this case capacity and due execution were admitted, knowledge of its

contents was presumed, unless the party alleging the contrary, proved it; that if the defendants had succeeded in shewing them that the deceased, at the time of execution, did not know the contents of the paper, it was not his will. The jury retired, and, coming in for further instruction, enquired of the Court whether, on the question of fraud, they were at liberty to take into consideration the contents of the paper. The Court instructed them no: *that* by itself *proved nothing;* for, however absurd and unnatural the dispositions of the will might be, if, from the evidence in the case, they were satisfied the deceased knew the contents of the paper, and with that knowledge executed it as his will, intending it so to be, it was his will; and upon that question all the evidence given in the case was submitted to them.

The jury rendered a verdict for the plaintiffs. The defendants' counsel moved for a new trial on the ground of misdirection by the Court. The new trial was refused and judgment rendered in favor of the plaintiffs, from which the defendants appealed to this Court.

The case was argued by *J. T. Morehead* for the plaintiffs, and *Winston* for the defendants.

(212) GASTON, Judge. If we are to understand the answer given by the presiding Judge to the enquiry of the jury, as laying down the proposition, that when there is any evidence of fraud or imposition in procuring the execution of an instrument as a will, the contents whereof are unknown or misrepresented to the supposed testator, the triers are not at liberty to consider the dispositions of property actually made therein, we should feel ourselves bound to hold that the jury had been misdirected. A conflict between these dispositions and the known testamentary intentions of the deceased—the repugnance of these dispositions to the claims of natural affection or of moral duty—their conferring material benefits on those through whose agency the supposed will has been prepared—these, and such as these, are circumstances fit to be considered and weighed in conducting the judgment to a proper conclusion. But it is plain, we think, that such would not be a fair construction of the answer.

The instrument itself had been permitted to be read to the jury, and the counsel for the caveators allowed to comment freely upon its dispositions. The jury had then been instructed that as the capacity of the deceased to make a will, and the formal execution of the instrument as his will were not questioned, the

only enquiry for them was whether the deceased knew the contents of the instrument, and they were directed, if they should be satisfied that he did not know the contents, to find that it was not his will. This instruction was never afterwards withdrawn, contradicted or modified. When they returned with the enquiry, whether they were not at liberty, upon the issue submitted to them, to take into consideration the dispositions in the will, his Honor answered in the negative. But this negative was properly qualified and fully explained by his accompanying observations. They were told "that the will *of itself* proved nothing, for, that however absurd and unnatural its dispositions might be, yet, if from the evidence they were satisfied that the deceased knew the contents of the paper, and with that knowledge executed it as his will, intending it so to be, it was his will;" and that it was with a view "to that question, *all* the evidence given in
(213) the case was submitted to them." Thus explained, it amounted to no more than what must be held to be clear law, that where capacity—formal execution—and volition all appear, no tribunal can pronounce against a will, because of its disapprobation, however strong, of the dispositions made by the testator.

PER CURIAM. Judgment below affirmed.

JOHN WALKER *vs.* BERNARD BAXTER.

1. Where, in an action to recover damages for a breach of promise, it appeared in evidence that a vessel, her tackle, &c., had been sold by the defendant to the plaintiff, on the 10th December, 1835; that after the great fire in New York, which occurred on the 16th of December in that year, some of the vessel's boats and sails were missing, and were supposed to have been destroyed by the fire—and subsequently it was agreed between plaintiff and defendant that the defendant should pay to the plaintiff "whatever sum it should require to put the vessel in the same repair and condition *in which she was at the time of the sale*, over and above five hundred dollars:" *Held* that upon this evidence the plaintiff could not recover on a count, in which he charged that the defendant had made a *false representation* at the time of the sale, and that he had promised to put the vessel, &c., *in the state represented*, over and above the sum of five hundred dollars.
2. The court must in every case pronounce whether the evidence offered corresponds with the allegations on the record.
3. The court ought never to instruct a jury as to the legal effect of supposed facts, which the jury cannot find.

This was an action to recover damages for the breach of a parol contract, tried before NASH, Judge, at Fall Term, 1838,

of New-Hanover Superior Court of Law, where there was a verdict for the defendant. The plaintiff's counsel moved for a new trial, on the ground of misdirection by the
(214) Judge, which motion was overruled, and judgment entered for the defendant. The plaintiff appealed.

The facts of the case, so far as the decision of this court is concerned, and the ground relied upon by the plaintiff's counsel, are stated in the opinion of the court.

Strange, with whom was *William H. Haywood*, argued the case for the plaintiff.

No counsel appeared in this court for the defendant.

GASTON, Judge. This was an action to recover damages for a breach of promise. On the 10th of December, 1835, at Wilmington in this State, the defendant sold and conveyed to the plaintiff the brig Fisher, with her sails, boats, and furniture, as she then lay in the city of New York. The testimony as to the promise alleged to have been broken came from a single witness, who testified, that soon after intelligence reached Wilmington, of the great fire which occurred at New York on the 16th of that month, and which was extensively destructive to houses, shipping and merchandize, the witness, by the direction of the plaintiff, and as his agent, informed the defendant that the boats and sails of the brig were missing, the sails supposed to be burnt; that the brig was, in other respects, unseaworthy; and that, unless the defendant would put her in the condition in which she was at the time of the sale, the plaintiff would not receive her; and that after different conferences, it was at length agreed, *that the defendant should pay to the plaintiff whatever sum it might require to put the vessel in the same repair and condition, in which she was at the time of the sale, over and above the sum of five hundred dollars.* There was evidence shewing, or tending to shew, that upon this agreement the plaintiff made reparations and supplied deficiencies to an amount much exceeding $500; and that the defendant refused to make any payment therefor. Upon the trial, sundry exceptions were taken on the part of the plaintiff to the Judge's instructions, and there having been a verdict and judgment for the defendant, the plaintiff appealed to this court.

(215) Upon the argument here, the plaintiff's counsel has abandoned, as untenable, all these exceptions save one, and upon that alone the controversy is made to depend.

There are several counts in the declaration. In one, it is

charged that, at the time of the sale, the defendant made representations in respect to the soundness of the brig, and the completeness of her equipments, which were unfounded in fact, and that, afterwards, in consideration thereof, he promised to pay to the plaintiff such sum as he should expend in putting the brig *in the state represented*, over and above the sum of five hundred dollars. And it is here insisted that, in relation to this count, the plaintiff had a right to require the instruction for which he asked, and which his Honor refused to give, "that, if the injuries did exist at the time of the sale, though they were not *known* to the defendant at the time of the promise, the promise, as proved, would support the action."

We are clearly of a different opinion. Waiving all other reasons for refusing to give this instruction, there is one which is obvious and conclusive. There was no evidence offered of such a promise, as is alleged in the count in question. The sole evidence of any promise, is in regard to repairs, necessary to replace the brig in the same plight in which she was at the time of the sale. And, upon this evidence, how could the plaintiff require any instruction, which would warrant the jury in finding a verdict for him, in relation to a different promise?

It is indeed contended that, as the agreement was wholly by parol, the meaning of the parties thereto was a question of fact, to be ascertained by the jury, and that the jury might have inferred from the evidence that it was not the *actual* state of the brig at the time of the sale, but her *supposed* or *represented* state, to which the promise referred. If there had been any ambiguity in the language of the witness, or in that of the parties, as testified to by him, or if there had been any contrariety of evidence in relation to the supposed promise, there would have been room for submitting to the jury the question of fact, what was the promise of the defendant. But certainly there is no
(216) function of the court more incontestable than that of pronouncing, whether the evidence offered corresponds with the allegations on the record. A jury cannot (rightfully) find any disputed fact without evidence; and the court ought never to instruct a jury, as to the legal effect of supposed facts, which the jury cannot find. In the agreement, as stated by the plaintiff's witness, there was no ambiguity. It admitted but of one construction. If he were believed, he proved a promise, variant from that set forth in this count; and if he were not believed, there was no evidence of any promise.

PER CURIAM. Judgment below affirmed.

EDWARD SHAW *vs.* WILLIAM MCFARLANE.

1. If two persons are bound by a bond or a judgment for the payment of a sum of money, the one is liable at law to the creditor in the same manner and to the same extent as the other, although as between themselves they stand as principal and security.
2. An agreement for indulgence to the principal does not at law amount to satisfaction of the debt; and nothing *in pais* can discharge an obligation or a judgment but performance or satisfaction.
3. The cases of *King* v. *Morrison*, 2 Dev., 341; *Binford* v. *Alston*, 4 Dev., 351, and *State Bank* v. *Locke et al.*, 4 Dev., 529, cited and approved.

This suit was commenced by a warrant to recover the balance of a former judgment before a justice, obtained by the plaintiff against Elisha B. Norfleet and the present defendant as his security. An appeal was taken from the judgment of the justice on the warrant to the County Court of Hertford, and thence to the Superior Court, where the case was tried before PEARSON, Judge, at March Term, 1839. A verdict and judgment were rendered for the plaintiff, and the defendant appealed to this court. The facts of the case are set forth in the opinion of the court delivered by the Chief Justice.

(217) No counsel appeared in this court for the plaintiff.
A. Moore for the defendant.

RUFFIN, Chief Justice. In 1831, one Norfleet and the present defendant executed a bond to the plaintiff for $101.50 cents, on which a warrant was sued out against both of the obligors, on the 27th of May, 1837. On the 1st of June following, Norfleet, by deed, (to which the plaintiff and one Valentine were also parties,) conveyed to Valentine personal property, of value sufficient to discharge the debt and costs, upon trust that if Norfleet should not pay the debt before the 15th of October following, Valentine should at any time thereafter sell the property and discharge the debt. A payment of $50 having been before made, the plaintiff, on the 30th of June, 1837, took judgment for the balance due on the bond and costs. After the execution of the deed, Norfleet retained possession of the property, using and disposing of it as his own. In October, he requested the plaintiff to have a sale made under the deed, and raise his debt, as he said the defendant was uneasy. The plaintiff said he would, but nothing was done until after the death of Norfleet, insolvent, in November, 1837, when Valentine sold such effects as Norfleet had not consumed or sold, and applied the proceeds thereof towards the satisfaction of the plaintiff. There was still a balance due on the judgment, for which the present suit was

brought. Besides other pleas, the defendant pleaded specially, that he was the surety for Norfleet in the bond and judgment given thereon, and that the plaintiff, without his privity, took the deed of trust, as above mentioned, as a security for his debt, and thereupon agreed to give time to the principal until the 15th day of October, 1837, for payment and also had allowed Norfleet to waste and convert the property, conveyed by said deed, to his own use; whereby the defendant was discharged.

On the trial, the presiding judge gave his opinion, that the facts set forth in the special plea, if true, did not discharge the defendant, who did not undertake merely to see that Norfleet should pay the debt, but, by executing the bond, became legally and directly bound therefor, as much so as Norfleet
(218) himself. Under this advice, the jury found a verdict for the plaintiff; and from the judgment thereon the defendant appealed.

Without adverting to the circumstance that the first judgment was taken against the principal and the surety, after the execution of the deed of trust by the former, and the agreement of the creditor to indulge, we should concur in the opinion of his Honor, regarding the suit as being brought on the original bond, instead of the former judgment. The circumstances, if unanswered, might create an equity, of which the defendant might have the benefit in another jurisdiction. But a court of law deals only with legal liabilities and legal discharges. There has been but one doctrine held on this subject by the courts of this State. *King* v. *Morrison*, 2 Dev., 341; *Binford* v. *Alston*, 4 Dev., 351; *State Bank* v. *Locke & al.*, 4 Dev., 529. If two persons are bound by a bond or a judgment for the payment of a sum of money, the one is liable to the creditor in the same manner and to the same extent as the other, although as between themselves they stand as principal and surety. In respect of the creditor, they are joint debtors, fixed with the same obligation; and what discharges one, discharges the other—and nothing less. An agreement for indulgence to the principal does not amount to satisfaction; and nothing *in pais* can discharge an obligation or a judgment but performance or satisfaction.

PER CURIAM. Judgment of the court below affirmed.

(219) RODNEY FRENCH *vs.* GEORGE W. BARNEY.

1. Where A., the payee of a bill of exchange, indorsed it to B., and B. to C., and C. then indorsed it "without recourse to him," but not saying to whom he indorsed it, it then became an indorsement in blank, and the bill became payable to bearer; and notwithstanding D. and E. afterwards indorsed it in full or specially, yet when it came again to C. by delivery, he had a right to demand payment of the bill from any prior indorser.
2. C. being the holder of the bill, the law implies, until something be shewn to the contrary, that he gave value for it, or came fairly and legally by it.
3. To make an endorsement of a bill *special* or *in full*, it must direct payment to be made to some particular person, firm or corporation.
4. A bill once endorsed in blank, becomes payable to *bearer* against the acceptor, drawer, and all prior endorsers.

This was an action on the case, tried at Spring Term, 1840, of Chowan Superior Court of Law, before PEARSON, Judge. The jury rendered a verdict for the plaintiff, subject to the agreement of the parties that if, upon the law of the case, the Judge should be of opinion for the defendant, the verdict should be set aside and a nonsuit entered. Upon argument the Judge set aside the verdict and ordered a nonsuit, from which judgment the plaintiff appealed. The following is the case sent up by the Judge:

This was an action on the case by the plaintiff as endorsee against the defendant as endorser of a bill of exchange. A copy of the bill and the several indorsements is sent as a part of the case. After the bill was endorsed by the defendant, it came to the hands of the plaintiff as endorsee. He endorsed it "without recourse." It went through several other endorsements, and was duly protested by the last endorsee, and due notice given to the defendant. After this the bill came to the possession of the plaintiff, the testimony did not shew in what way, before this action was brought. Defendant insisted that as plaintiff had indorsed "without recourse," the bare possession of the bill does not entitle him to sue in his own name as endorsee. This question was reserved, and, under the charge of the Court, the jury returned a verdict for the plaintiff.

Upon the question reserved, the Court was of the opin-
(220) ion that the plaintiff could not maintain the action.

This bill could only pass by endorsement; where, however, an endorsee endorses over, and afterwards takes up the bill, in discharge of his liability, he is remitted to his former right, and may strike out the subsequent endorsements and sue as endorsee; and the fact of his having possession of the bill raises the presumption that he has taken it up in discharge of

his previous liability. But in this case the endorsement being "without recourse," repels that presumption, for he was under no liability; and the possession of the bill simply raises a presumption that he is owner by purchase or otherwise, and he stands in the condition of a stranger, who had purchased the bill without endorsement to himself. It was agreed by the parties that the subsequent endorsements should be considered as stricken out, provided the Court thought that the action could be maintained.

Bill and endorsements referred to.

Exch. $637.50. *Edenton, N. C., April 30th,* 1836.

Twelve months after date of this first of exchange (second unpaid of same tenor and date) pay to the order of Geo. W. Barney, Esq. six hundred and thirty-seven 50-100 dollars, for value received, and charge the same to account of

Your ob't servts.

HAUGHTON & BOOTH.

To Messrs. Haughton, Boardman & Noble,
New York.

Accepted. HAUGHTON, BOARDMAN & NOBLE.

(Endorsed)

Pay Thos. J. Charlton or order.

G. W. BARNEY.

Pay Rodney French, Esq. or order.

THOS. J. CHARLTON.

Without recourse to me.

RODNEY FRENCH.

GEO. BOWEN.

Pay H. E. Hudson, Esq. Cash'r, or order.

GEO. S. WEAVER, Cash'r.

Pay H. Baldwin, Esq. Cash'r, or order.

H. E. HUDSON, Cash'r.

(221) *A. Moore* for the plaintiff.
Kinney and Heath for the defendant.

DANIEL, Judge. This was an action by the second endorsee against the first endorser of a Bill of Exchange. The execution of the bill by the drawer, the acceptance, due demand and notice were all admitted to be complete. The defendant, however, contended that as the plaintiff had once owned the bill as second endorsee, and had assigned it "without recourse," he could not again obtain a title to it, so as to give it in evidence on this declaration, and of this opinion was the Judge: because, he said, as the plaintiff had once made a restrictive endorsement, and by

it had escaped from liability on the bill, he could not again obtain a title, so as to enable him to sue on it as endorsee. The Judge said, that when an endorsee endorses over, and afterwards takes up the bill in discharge of his liability, he is then remitted to his former right, and may strike the subsequent endorsements and sue as endorsee, and the fact of his holding the bill raises the presumption of his having taken it up in discharge of his previous liability; but, in this case, the endorsement by the plaintiff being "without recourse" repelled such a presumption, and he had no title. The same arguments have been pressed upon us in this court by the defendant's counsel. But the authorities cited, only shew that an endorser in full, who takes up the bill, is remitted to his former title, and may strike out his endorsement and sue as endorsee those standing before him on the bill. The law presumes that he has given value for it, therefore will permit him to strike out the names of persons, who apparently own and have the legal title to it. But the restrictive endorsement of French in this case was in blank; it directed payment to be made to no particular person, firm or corporation, which is necessary to make an endorsement special or in full. The next endorsement was also in blank. The bill, after it was so endorsed in blank, assumed the character, and had the effect thereafter of a bill payable to bearer. Chitty on Bills, 136. Byles on Bills, 84. *Peacock* v. *Hodges*, Douglass, 633. *Francis* v. *Mott*, Doug., 612. The two first and two
(222) last endorsements being *special* or *in full*, did not prevent the bill assuming the character of a bill payable to bearer, after it had been once endorsed in blank, *Smith* v. *Clarke*, 1 Esp. Rep., 180; *Holmes* v. *Hooper*, Bay. Rep., 158; Chitty on Bills, 136; for it then became payable to *bearer* as against the drawer, the acceptor, the payee, the blank endorser, and all endorsers before him. Byles on Bills, 85. The bill passed as currency in the market, and French had as much right to purchase it as any body else. He being the holder, the law implies, until something be shewn to the contrary, that he gave value for it, or rather came fairly and legally by it. Byles on Bills, 60; 3 Kent's Com., 77. The plaintiff had therefore acquired a legal title to the bill by delivery. The restrictive endorsement by French did not break the chain of title. The idea of the Judge that French must have been once liable, as endorser on the bill, and that he must have taken it up in consequence of that liability, before he could gain a title to sue on it, we think it is erroneous. He, being impliedly the *bona fide* holder, had a right

to strike out all the endorsements below that to himself, and declare as the second endorsee. *Smith* v. *Clarke,* 1 Esp. Rep., 180.

PER CURIAM. Judgment of nonsuit set aside, and judgment rendered for the plaintiff on the verdict.

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(223) Den on demise of ALFRED S. BARROW *vs.* PENELOPE ARRENTON.

1. A writ from a court, commanding the Sheriff to summon A. and B., heirs of C., deceased, to be and appear, &c., "then and there to shew cause, if any, why D. shant have judgment against the lands of said deceased, in the hands of his said heirs, for $150, besides interest and cost," is not such a *scire facias* as is required by the act of 1784, subjecting the real estate of a deceased person to the payment of his debts (Rev. St., c. 63, s. 1), though a debt may have been previously established against the administrator, the plea of fully administered found in his favor, judgment signed, and an award of *sci. fa.* against the heirs.
2. Such a writ does not set forth nor refer to a judgment previously rendered in any action for any person, and of course does not call on the heirs to shew cause why execution on that judgment shall not issue against the lands descended to them.
3. Where, upon the return of such a writ, judgment by default was entered upon the record, and an award of execution against the lands in the hands of the heirs, *held* that the judgment was a nullity, and that the purchaser at a sheriff's sale, under an execution issuing upon it, acquired no title.

This was an action of ejectment, brought to the Fall Term, 1839, of Perquimons Superior Court of Law, and tried at Fall Term, 1840, before BATTLE, Judge. The following is the case made up by the Judge:

The lessor of the plaintiff, after proving the defendant to be in possession of the premises described in the declaration, produced in evidence the deed of the sheriff to him for lots No. 2 and 3, the premises in question; then two judgments against one William Arrenton's administrator, with a finding of fully administered in favor of the administrator; an order for *scire facias* to issue against said Arrenton's heirs; instruments alleged to be *sci. fa.'s*, and *venditioni exponas's*, under which the lessor shewed the will of Ambrose Knox, devising the lands in question with other lands to the children of John and Parthenia Wyatt, in the division of which among the children lot No.
(224) 2 was drawn by Mary Wyatt, and lot No. 3 by Ambrose K. Wyatt; the death of Mary Wyatt, leaving Ambrose K. Wyatt her heir at law; a judgment against Ambrose Wyatt's

administrator, with a finding of fully administered in favor of the administrator; an order for a *sci. fa.* against heirs and devisees of the said Ambrose; instruments alleged to be *sci. fa.'s* against said heirs and devisees; judgment pursuant thereto; *venditioni exponas's*, and the Sheriff's deed to Hugh Wyatt; a deed from Hugh Wyatt to Charles Arrenton, Charles Arrenton's death without children, intestate; a judgment in favor of William Arrenton against his administrator, with a finding of fully administered in favor of the administrator; an order for *sci. fa.* against the heirs of the said Charles, of whom the said William was one; instruments alleged to be *sci. fa.'s;* judgment pursuant thereto; *venditioni exponas* and Sheriff's deed to Charles and James Arrenton, which the plaintiff alleged was fraudulent and void as to William Arrenton's creditors, because the purchase money, as he alleged, was paid by William Arrenton.

The defendant's counsel objected that the instruments alleged to be *sci. fa.'s* could not be taken as such, and that the entries of judgments pursuant thereto were void as judgments; and that therefore the deeds from the different sheriffs, through which the plaintiff's lessor deduced his title, were inoperative; and further, that the judgment in favor of William Arrenton against the heirs of Charles Arrenton, of whom he was one, was void, on account of the same person being both plaintiff and defendant, and that in both accounts the plaintiff's lessor could not make out a title, and plaintiff must be nonsuited.

The court was of opinion that the instruments offered as *sci. fa.'s* could not be received as such; that they were substantially defective in not reciting any judgment; that the heirs could derive no information from them as to the purpose for which they were summoned into court; and that as the judgments were entered up pursuant to the *sci. fa.'s*, without the appearance of the heirs in court, they were the same as if no process had been served on the heirs, and were therefore void; and that as
(225) the act of Assembly required *sci. fa.'s* to be issued against the heirs, before the court could make any order to sell the lands, the purchaser acquired no title by his purchase under the *venditioni exponas.*

In submission to this opinion, the plaintiff submitted to a judgment of nonsuit, from which he appealed to the Supreme Court.

Copy of one of the instruments alleged to be a *Sci. Fa.*

State of North Carolina

To the Sheriff of Perquimons County, greeting:

You are hereby commanded to summon Mary White of full age, Parthenia Arrenton and Penelope Arrenton, to whom John Wood is guardian, and Charles Arrenton to whom Jonathan H. Jacocks is guardian, heirs at law of William Arrenton, deceased, personally to be and appear before the justices of the County Court of Pleas and Quarter Sessions at the next court to be held for the county of Perquimons, at the Court House in Hertford, on the second Monday in August next, then and there to shew cause, if any, why Thomas Long shant have judgment against the lands of said deceased in the hands of his said heirs for $150, besides interest and costs; and this you shall in no wise omit under the penalty by law enjoined. Witness, John Wood, Clerk of the said court, at Hertford the 2d Monday of May, in the 60th year of our independence, 1836.

Issued the 27th of May, 1836.

(Signed) JOHN WOOD, Cl'k.

Returned, Executed. N. BAGLEY, Sh'ff.

The other *sci. facias's* were in the same form. In the last case mentioned, of T. Long *vs.* Arrenton's heirs, a verdict and judgment, at May Term, 1836, had been rendered against the administrator as follows:

Jury impannelled and sworn say there is no payment nor set off—value of the obligation $150, and assess the plaintiff's damages in interest to $18. They further find the defendant has fully administered and has no assets. By the court judgment for $168. Issue *sci. fa. vs.* the heirs. On the return of the *sci fa.* to August Term, 1836, "judgment pursuant to *sci. fa.* and on motion, ordered that execution issue, and that Clerk

(226) endorse thereon that the Sheriff will only sell the interest of the heirs, who are of full age, in the lands of William and James Arrenton, dec'd, and forbear as to the infant heirs—stay execution 12 *mos.* as to them."

Badger for the plaintiff.

Kinney and A. Moore for the defendant.

GASTON, Judge. It was necessary for the plaintiff's lessor, in order to establish a title to the land in controversy, to shew that under his purchase at Sheriff's sale he had acquired the interest therein which had descended from William Arrenton to

his heirs at law. According to the settled law of this State, the Sheriff's sale did not transfer that estate, unless there was a judgment, or order of court, warranting the execution under which the land was sold.

The abstract from the records, in relation to the supposed judgment and the proceedings upon it, is not as full as we could desire. Especially we could wish that the execution itself had been set forth at length. But as we have no means of making the case more full than it appears upon the transcript, we have proceeded to consider it such as we understand it to be.

It appears from the records of Perquimons County Court that there was an action there pending, instituted by one Thomas Long against the administrator of William Arrenton, in which action the defendant had pleaded "payment and set off and fully administered," at the May Term, 1836, of the said court; that on the pleas of payment and set off, the jury found for the plaintiff; and on that of fully administered, returned a verdict for the defendant: whereupon the plaintiff had judgment for $168 and his costs of suit, to be taxed by the Clerk, and prayed for a *scire facias* to be awarded against the heirs. From the said May Term there issued to the succeeding August Term a writ, alleged to be a *scire facias*, commanding the Sheriff to summon the persons therein named, and styled "the heirs at law of William Arrenton," (some of them described as infants, and sued by guardians therein named,) personally to be and appear
(227) before the next term of the said court, "to shew cause why Thomas Long shall not have judgment against the lands of said deceased in the hands of his said heirs for $150 besides interest and costs." The Sheriff returned this writ executed, and thereupon, at the August Term, 1836, there is this entry on the docket of the court: "Judgment pursuant to *sci. fa.*, and on motion, ordered that execution issue, and that the Clerk endorse thereon that the Sheriff will only sell the interest of the heirs of full age in the lands of William and James Arrenton deceased, and forbear as to the infant heirs; stay execution twelve months as to them." From August Term there issued an execution, commanding the Sheriff of the lands of William Arrenton, descended to his heirs at law (naming them) to cause to be made the sum of $168 and costs of suit which Thomas Long had recently recovered in said court, and also his costs expended on the *scire facias* against the said heirs; and under this execution, the Sheriff sold and conveyed to the plaintiff's lessor the land in controversy.

It is evident that the judicial proceedings referred to were attempted to be fashioned after the model of those prescribed in our act of 1784, (see *Revised Code*, c. 226, 1 Rev. St., c. 63,) but the attempt has been awkward and unsuccessful. The Stat. of 5 Geo., 2 c. 7, had made lands in the colonies liable to, and chargeable with, *all* just debts, and declared them assets for the satisfaction thereof in like manner as real estates were, by the laws of England, liable for debts due by specialty; and had also enacted that they should be subject to the like remedies and process for seizing and selling the same for the satisfaction of such debts, as personal estates in the colonies were liable to for seizure and sale. In furtherance of the objects of this statute, our Legislature in 1777, (see Revised Code 1777, c. 115, s. 29,) enacted that process which theretofore issued against goods and chattels should issue against goods and chattels, lands and tenements; and that upon such process it should be the duty of the Sheriff to levy upon lands and tenements, if a sufficiency of goods and chattels could not be had to answer the exigency of the writ. But until the act of 1784, there was no
(228) *legislative* provision, by which, on the decease of a debtor by simple contract, his lands, which, by the statute of George the Second, had been rendered liable for the satisfaction of such debt, were to be pursued by the creditor. That act, after reciting that doubts were entertained whether the lands of deceased debtors, in the hands of their heirs or devisees, should be subject to the payment of debts upon judgments against executors or administrators, *in order to remove such doubts thereafter, and to direct the mode of proceeding in such cases*, enacted that when in an action at law an executor or administrator should plead fully administered, no assets, or not sufficient assets to satisfy the plaintiff's demand, and such plea should be found in favor of the defendant, the plaintiff might proceed to ascertain his demand and sign judgment; but, before taking out execution against the real estate of the deceased debtor, a writ or writs of *scire facias* should issue, summoning the heirs or devisees of such debtor to shew cause wherefore execution should not issue against the real estate for the amount of such judgment, or so much thereof as the personal assets were not sufficient to discharge; and that if judgment should pass against the heirs or devisees, or any of them, execution should issue against the lands of the deceased debtor in their hands. Since this act, therefore, whatever doubts might have been entertained before, the law is positive that the lands of a deceased debtor in the hands of his

heirs cannot be sold, upon a judgment obtained against an executor or administrator, until after a *sci. fa.* shall isssue to the heirs to shew cause, if any they have, why execution of said judgment shall not issue against the lands.

Now, with every disposition to view indulgently defects and errors of form in judicial proceedings, and especially in those which are had in the County Courts, we must hold that the writ, which is here relied on as a *scire facias* under the act of 1784, is fatally defective, and cannot be treated as such. It does not set forth nor refer to a judgment previously rendered, in any action for any person, and of course does not call on the heirs to shew cause why execution upon that judgment shall not issue against the lands descended to them. It does not pur-
(229) port to be connected with any antecedent proceedings whatever, had in that court or in any court; and we are unable to trace a connection between the writ and the former proceedings in that court, except such as may be inferred from the identity of name of the plaintiff in those proceedings and the plaintiff in the writ, and from the circumstance that those proceedings were had against the administrator of the same person, whose heirs are by the writ directed to be summoned. The writ is an original process, of a very singular character indeed, calling on the heirs of William Arrenton to answer to a demand for $150 of Thomas Long, which is no way described, but is sought to be converted into a judgment against the lands to them descended; and is not a judicial process founded upon a matter of record or matter incidental thereto, in order to further and accomplish the end and object of the record, by insuring its effectual operation. It would violate principle to regard this as a *scire facias* under the act of 1784.

But it is argued that it is immaterial how defective the *scire facias* may be, if a judgment or order of court of competent authority has been made, after notice to the parties interested, awarding the execution which did issue. Suppose this position be conceded, will the case of the plaintiff be helped? He must produce some judgment or order of the court warranting *that execution*. What is it? What purports to be the judgment? "Judgment pursuant to *sci. fa.*" is *per se* a nullity. To give it any meaning, we are obliged to recur to what is understood to be the *scire facias* referred to, and by a liberal aid of this we may perhaps make out that "Thomas Long has judgment against the lands of William Arrenton, deceased, in the hands of his heirs for one hundred and fifty dollars besides interest and costs."

What would be the meaning and legal effect of a judgment rendered in those terms, and what kind of process might lawfully issue to enforce it, are enquiries perhaps not easily answered, and, at all events, unnecessary to be now considered. For it is very clear that the execution which issued, did not correspond with, and therefore was not, an execution to enforce this supposed judgment or award. It is an execution to make of the
(230) lands descended to the heirs of Wm. Arrenton, the sum of *one hundred and sixty eight dollars,* and the costs of suit taxed by the clerk in the suit, which Thomas Long recovered against the estate of William Arrenton in the action brought by him against the administrator of the said William, and the costs of the *scire facias* sued out against the heirs thereon. There was indeed *such a judgment* recovered as is recited in the execution; but unfortunately for the title of the lessor of the plaintiff, there was no *scire facias* against the heirs previously to the suing out of such execution thereon. There was, therefore, no judgment or order of court, in law, warranting that execution.

PER CURIAM. Judgment of the Superior Court affirmed with costs.

JAMES R. WOOD *vs.* REDDICK DEEN.

1. The fact of the insolvency of a debtor, from the time his debt became due, is proper evidence to be submitted to a jury, and estimated by them in considering whether the presumption of payment of a bond, under the act of 1826, (1 Rev. Stat., c. 65, s. 13,) is rebutted.
2. This answer to the presumption will be more or less forcible, according to the nature and degree of the insolvency.

This was an action of debt on a bond, payable to the plaintiff, and executed by the defendant, for the sum of two hundred and fifty-five dollars fifty cents, bearing date the 8th day of January, 1823, and payable the 1st day of January following. The suit was instituted in Anson Superior Court of Law, on the 16th day of August, 1838. The defendant relied upon the plea of payment, supported by the presumption, arising under the act of 1826, from lapse of time. To rebut this presumption, the plaintiff offered evidence of the defendant's being in
(231) insolvent circumstances, though no evidence was offered of his having taken the benefit of any act of insolvency; and no other fact or circumstance was offered in evidence by the plaintiff to rebut the presumption. His Honor, Judge SETTLE, charged the jury that if they believed the defendant to have been

in insolvent circumstances at the time the bond became due, and to have continued so ever since, and that the plaintiff had, for that reason, forborne to sue, they might find that it rebutted the presumption, which they were bound to make from the lapse of time unexplained, that the bond had been paid.

The jury found a verdict for the plaintiff. A new trial was moved for by the defendant and refused, and a judgment rendered for the plaintiff, from which the defendant appealed to the Supreme Court.

Mendenhall for the plaintiff.

Strange and *Winston* for the defendant.

RUFFIN, Chief Justice. The point raised in this case, is one of those raised and decided in *McKinder* v. *Littlejohn* at the last term. Our opinion then agrees with that of his Honor, now under revision. It is founded on the natural inference that a man has not done that, which, it appears, he was not able to do. The inference from insolvency will, indeed, be more or less forcible, according to its notoriety and duration, and the degree or hopelessness of it, if the expression may be allowed. Suppose it to be proved that the debtor was discharged on his oath of insolvency before the debt fell due, and that ever since he had been a beggar in the street, or a pauper on the parish; the conclusion would be so morally and obviously certain, that there could be no danger in telling the jury that there could not be a presumption of the payment in such a case. No one ought to be required to commit the folly of suing a beggar. The facts here are indeed not so strong. But they partake of the same nature, and are therefore fit for the consideration of the jury, as tending to satisfy them that, in fact and truth, the debt was never paid. In that way only was the evidence left to the jury in this case. They may have erred in the conclusion of fact (232) drawn by them. But that is not for our consideration. The fact, that the debt was or was not paid, was material enquiry, and to that enquiry this evidence was in reason, and we think in law, relevant.

PER CURIAM. Judgment of the Superior Court affirmed.

JAMES D. BRIDGERS *vs.* MALCOLM PURCELL & al.

1. Where a petition, under the Acts of Assembly relating to damages sustained by the erection of public water mills, alleged "*that by the erection of the mill 30 or 40 acres of his land were overflowed, and that by the said overflowing, the healthfulness of his plantation on which he resides is greatly deteriorated, the*

overflowing extending to within 300 *yards of his dwelling house*," the plaintiff is only entitled to recover damages for the injury done by inundating his own lands, not for an injury to the health of his family by other parts of the mill pond. The plaintiff must state in his petition *in what respect* he was injured, and his proofs cannot go beyond his allegations.

2. The proceedings under such a petition being in court of law, where *viva voce* testimony is always preferred, the party has a right to have the attendance of his witnesses taxed in the bill of costs.

3. The jury having assessed in this case but one dollar damages, the court did right in giving the plaintiff no more costs than damages under the act of 1833.

This was a petition, filed at May Term, 1834, of Robeson County Court, by the plaintiff, to recover damages for injuries, which he alleged he had sustained by the erection of a water mill by the defendants, the proceeding being under the acts of Assembly giving a remedy by petition to those, who had been injured by the erection of a mill. The injury complained of was "that thirty or forty acres of the plaintiff's land were overflowed; that by the said overflowing, the plaintiff was not only deprived of the 30 or 40 acres so inundated, but that the healthiness (233) of his plantation, on which he resided, was greatly deteriorated thereby." The case was tried in the County Court, and thence there was an appeal to the Superior Court. A verdict and judgment were here rendered in favor of the plaintiff, from which he, being dissatisfied, appealed to the Supreme Court, where a new trial was granted at June Term, 1836, (see 1 Dev. & Bat. Rep., 492.) It again came on for trial at Robeson Superior Court, Fall Term, 1840, before his Honor Judge SETTLE. On the trial, the defendant's counsel requested the Judge to charge the jury, that although they might be satisfied that the defendant's pond overflowed a portion of the plaintiff's land, and the effect of the whole pond had been injurious to the health of the plaintiff and his family, yet that the plaintiff could recover for only that portion of injury to his health and that of his family, which resulted from overflowing his own land. The plaintiff's counsel then interposed and requested his Honor to charge, that if the jury should assess any damages for overflowing the plaintiff's land, and should think that the effect of the defendant's pond *as a whole* was injurious to the health of the plaintiff and his family, they should assess damages for the whole amount of such injury. His Honor declined adopting the suggestion of either counsel, but told the jury if they were satisfied by the testimony, that the defendant, by the erection of his mill-dam, or by continuing it after he became the owner of the mill, although the dam had been erected by one under whom he

claimed, had inundated any part of the plaintiff's land, that the plaintiff was entitled to recover such damages as they thought he had sustained by having his land inundated. And if they thought that the defendant, by so covering the land of the plaintiff, had rendered his plantation unhealthy or uncomfortable, they should give the plaintiff damages for that injury.

The jury found a verdict for the plaintiff, and assessed his damages at one dollar a year for five years.

A new trial on account of misdirection by the court was moved for and refused.

The defendant then moved, first that in the taxation of costs, the plaintiff should not be allowed for the personal
(234) attendance of his witnesses, as, the proceeding being by petition, his testimony should have been presented on paper or by depositions, which motion was overruled. The defendant then moved that the plaintiff, in the taxation of costs, be allowed no more costs than damages, which was accordingly directed by the court; and that, as to the balance of the costs, each party should pay his own costs. Judgment having been rendered according to the finding of the jury, and the opinion of the court as to the costs, the plaintiff appealed to the Supreme Court.

Strange for the plaintiff.

No counsel appeared for defendant.

DANIEL, Judge. The act of Assembly requires, in cases of this kind, that the plaintiff should set forth in his petition "in what respect he is injured by the erection of said mill." This petition states the plaintiff's injury as follows: "By reason of the erection and continuance of said mill by defendant, about thirty or forty acres of land, belonging to your petitioner, are inundated and overflowed with water; that by *the said overflowing* your petitioner is not only deprived of the thirty or forty acres *so inundated*, but that the healthiness of his plantation, on which he resides, is greatly deteriorated thereby, the overflowing extending to within 300 yards of his dwelling house." On the trial, the plaintiff's counsel prayed the court to charge the jury, that in assessing damages for overflowing the plaintiff's land, if the effect of the defendant's mill pond *as a whole* was injurious to the health of the plaintiff or his family, they should assess their damages for the *whole* amount of such injury. The Judge declined to instruct the jury as prayed for; but he charged them thus: "that, if the defendant's mill pond had inundated any

part of the petitioner's lands, he was entitled to recover such damages as he had sustained by having his lands inundated, and that, if they thought the defendant *by so covering the land of the petitioner*, had rendered his plantation unhealthy or uncomfortable, they should give him damages for that injury." We are now asked whether this charge was correct. We
(235) answer, in our opinion it was not erroneous. We think that the plaintiff had no right to demand damages for injuries, of which he had not stated in his petition, "in what respect they had arisen." His *probata* should correspond with his *allegata;* and his damages should be the result of that correspondence. It is unnecessary to say, whether the prayer of the plaintiff's counsel should or should not have been complied with, if his petition had contained an allegation, sufficiently broad to have embraced evidence of an injury of such a description as that spoken of.

Secondly, the defendant insisted that the tickets of the plaintiff's witnesses should not be taxed in the bill of costs: he said that the testimony should have been taken by way of depositions. We think the objection was correctly overruled. The proceedings were at law, where *viva voce* testimony is never dispensed with if it can be obtained.

Thirdly, the jury assessed the plaintiff's damages to one dollar. The court in rendering judgment, gave the plaintiff no more costs than damages. This we think was right and proper by force of the act of Assembly, passed in 1833. The petition was filed at May sessions, 1834. The Legislature at its session of 1834, passed an act amending the act of 1833; but it was done to obviate a supposed difficulty, which might arise on the construction of the first act. We are of opinion, however, that the intention of the Legislature in 1833 is fairly to be seen from that act, that if the plaintiff should fail to recover five dollars damages, he should have no more costs than damages. Upon the whole case, therefore, we are of opinion that the judgment must be affirmed.

PER CURIAM. Judgment of the Superior Court affirmed.

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(236) ISAIAH H. SPENCER & al. *vs.* MILES WHITE.

1. When goods are shipped on board of a vessel, to be carried for freight, the master of the vessel, on his arrival at the port of delivery, has a right to retain the goods until the freight is paid by the consignee.

2. But yet if he delivers the goods to the consignee, without receiving the freight, the shipper of the goods, if he is also the owner, and the consignee merely his agent, is liable for the freight, notwithstanding the common clause in the bill of lading "to be delivered to the consignee or his assignees, he or they paying freight for the same."

3. Generally a consignee, by receiving the goods, becomes liable for the freight.

4. But it seems it is not so, when he is only the agent of the consignee, and that fact is known to the master.

5. A party may prove the fact to be different from what one of his own witnesses has stated it to be. That is not discrediting his witness.

This was an action of assumpsit brought to Spring Term, 1838, of Hyde Superior Court of Law, and tried at Fall Term, 1840, before his Honor Judge DICK. There was a verdict and judgment in favor of the plaintiff, and the defendant appealed to the Supreme Court. The facts of the case are fully set forth in the opinion delivered by the court.

No counsel appeared for either party in this court.

RUFFIN, Chief Justice. The defendant shipped on board of a vessel, belonging to the plaintiffs, and then lying at Elizabeth City, a cargo of corn; for which the Captain signed bills of lading, expressing that the cargo was "to be delivered to John Williams, at Charleston, in South Carolina, or to his assigns, he or they paying freight for the same." The consignee received the cargo, and paid the freight, except the sum of one hundred dollars, and for that balance this action was brought.

For the purpose of shewing that balance to be due, the plaintiff read the deposition of Williams, the consignee, who stated that he was the agent of the defendant, and so informed the master, when settling for the freight; and that he withheld the sum of one hundred dollars on account of the damaged state of part of the corn, and referred the master to the defendant for the final adjustment of the difference on that point. The witness further stated "that the damage did not arise from stress of weather or the insufficiency of the vessel, but from
(237) her having had a long passage, and from the heat of the stove in the cabin, as he, the witness, thought."

The plaintiffs then offered to prove by other witnesses that the damage did arise from stress of weather, and not from the heat of the stove in the cabin. To this evidence the defendant objected, as an attempt of the plaintiff to discredit his own witness. But it was admitted by the court.

The counsel for the defendant then moved for a nonsuit, because, upon the bill of lading, the consignee was primarily

liable. But the court overruled the motion; and there was a verdict for the plaintiffs, and from the judgment thereon the defendant appealed to this court.

Although we are without any reported adjudication of our own upon the point before us, yet it is not new nor unsettled in those courts, in which the consideration of commercial contracts is of frequent occurrence. We find that in England this stipulation in a bill of lading has a fixed construction, opposed to that contended for by the defendant.

The clause "he, the consignee, paying freight," is admitted by every one to give the master a right to retain the cargo, until the freight be paid. But it has never been supposed, that, by the delivery before payment, the freight was forfeited, so that it could be recovered from no person. On the contrary, the freight is wages earned, and may be recovered from any person, who may have promised to pay it, or from whom the service was, in legal contemplation, performed and against whom, therefore, the law implies a promise to pay. Generally, it may be laid down, that the consignee, by receiving the goods, becomes bound for the freight; for besides that he has the fund with which to make the payment, he is justly chargeable upon the ground that, as by the bill of lading he could demand the goods only on the condition of paying the freight, it is to be implied that he was permitted to receive them only upon his promise to pay it. To this, it seems, an exception has been admitted, *Ward* v. *Felton*, 1 East., 507, that if the consignee be only the agent of the consignor, and be known to the master to be but agent, he does not make himself debtor for the freight by accepting the consignment. If that case be law, it appears to be decisive (238) of the present case; for Williams was the defendant's agent, and without any interest in himself, and refused to pay this part of the freight; and there is no complaint that he did not account to the defendant for the whole cargo, deducting only the freight he actually paid. But supposing the consignee to have become bound by receiving the cargo, still the question remains whether the shipper also be not liable, either under the express provisions of the charter party, or (which is our case) as the owner of the cargo. And it seems to be undoubted law at this day that he is thus liable, though formerly it was thought otherwise, and for reasons of much weight.

It is obvious that, in many cases, the shipper has an interest in the freight being paid by the consignee. He may prefer the payment being made at the port of delivery, rather than at home,

on account of the exchange. He may prefer it also for the reason, that he thereby gets so much of the proceeds of his cargo promptly out of the hands of the consignee, freed from further risk of his failure or not accounting faithfully; so that he would at least save the freight, tho' he might lose the rest of his adventure. Hence it might well seem that, while this clause of the contract authorised the master, for the benefit of his owner, to retain the goods until the freight was paid, it also, for the benefit of the shipper, imposed on him the obligation to do so. It is not, therefore, surprising that it should at one time have been held by an eminent Judge, Lord KENYON, in *Penrose & al.* v. *Wilkes*, stated by Lord ELLENBOROUGH in *Shepard* v. *De Bernals*, 13 East., 570, that the master delivered the goods at the peril of losing the freight, if he could not get it from the consignee. But in that opinion he was not sustained by the Court of King's Bench, which held that the charter was liable for freight, notwithstanding the delivery of the cargo to the consignee. That decision was followed by a similar one in *Tapley* v. *Martins*, 8 Term R., 451, in the same court, and also in *Christy* v. *Row*, 1 Taunt., 300, in the Common Pleas. But the whole subject was again and finally considered in the case just mentioned of *Shepard* v. *De Bernals*. It was there
(239) admitted that the question turned on this, whether this clause was introduced into the bill of lading for the security of both parties, the ship owner and the merchant, or for that of the ship owner only; and it was determined that the latter was the true construction. It followed that, although the master had an option to insist on getting the freight at the port of delivery and before he parted from the goods, yet he might waive a provision, introduced exclusively for the owner's advantage, and that, without prejudice to his recourse against the shippers. In the most commercial part of our own country, the same doctrine prevails; at least to the extent of determining this case. In *Bosher* v. *Hoven*, 17 Johns. R., 237, it was held that, although the consignor is not liable for the freight of goods, shipped on account of the consignee, yet he is liable for those owned by himself and shipped on his own account, notwithstanding the bill of lading had the common clause, and the master delivered the goods without obtaining payment from the consignee.

Upon the question of evidence there is no doubt. The objection is entirely unfounded. There was no attempt to discredit the witness. A party may prove that the fact is not as it is stated to be by one of his witnesses; for that is merely shewing

a mistake, to which the best men are liable. But in this case the witness did not even profess to state the fact, as of his knowledge, but gave only an opinion. Then direct evidence was offered, to shew the fact to have been, in reality, different from what the first witness said he thought or supposed it to have been; which is perfectly consistent with the integrity of the witness.

PER CURIAM. Judgment of the Superior Court affirmed.

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(240) ABIGAIL HARRISS *vs.* JOHN P. MABRY.

1. A master is not liable for an actual trespass, which his servant may commit, without his previous command or subsequent assent; but he is liable in an *action on the case* for the tortious acts, negligence or unskilfulness of a servant, acting in the prosecution of his service, or in the exercise of the authority he has given him, though not under his immediate direction.
2. In this case, which was for wrongfully and negligently permitting the plaintiff's slave to pass in the defendant's stage coach, without the permission of the plaintiff, whereby the slave escaped and was lost for some time to the plaintiff, and she was put to great expense, &c., and where the evidence was that the defendant's drivers and stage agents were guilty of gross negligence in taking the slave beyond Salisbury, where her pretended pass was at an end, and permitting her to travel in defendant's stages to Virginia, whereby the slave was lost to the plaintiff, *Held by the court* that the defendant was liable for the injury.
3. The plaintiff in this case may recover all such damages as may be properly considered the consequence of the wrongful acts of the defendant's servants, while in his service.

This was an action on the case, tried before his Honor Judge PEARSON, at August Term, 1840, of Cabarrus Superior Court of Law, for carrying a slave out of the State. It was admitted that the defendant and others were owners, as copartners, of the Piedmont line of stages from Yorkville, South Carolina, through this State, to Prince Edward Court House, in Virginia; from which latter place there was another line of stages to Baltimore. One Morris stated that he was employed by defendant and his copartners to drive the stage from Charlotte to Brummel's in Davidson county; that about the middle of December, 1838, a mulatto girl got into the stage at Mrs. Smith's, a respectable lady who lives on the road about 8 miles south of Concord, in Cabarrus county. The girl paid her passage to Salisbury. At Concord, where the stage stopped a short time, Morris saw that the girl had a pass, signed by Mrs. Smith, permitting her to go to Salisbury; and he was there informed that the girl was a

slave, the property of the plaintiff, who lived within a few miles of Mrs. Smith's. Morris carried the girl openly and
(241) without any kind of concealment to Salisbury. She then paid her passage and was entered on the way-bill for Greensboro'. Morris then took her on to Brummel's, about 35 miles from Salisbury, and she continued on in the Greensborough stage. Mr. Harris stated that about the time mentioned by Morris, the mulatto girl, the property of the plaintiff, left the plaintiff's house without her permission, and, understanding she had taken the stage, he pursued on in the next stage, and heard of her along the route, until he arrived at Baltimore, in Maryland; at which place he had her apprehended, and brought her back. At several places on the route, he called at the stage offices, and saw an entry on the way-bill, "Mary Harris, a yellow girl." At Greensborough, one Townsend, at whose house the stage stopped, and whom he presumed to be the agent, from the fact of his receiving the stage fare from himself and the other passengers, told him that a girl, answering the description, had taken her passage and gone on in the stage to Prince Edward Court House. Harris stated the plaintiff's girl was absent from her service about three weeks; that he had kept an account of his expenses in going to Baltimore and back, including that of the girl on her return, and the amount was $214, exclusive of his own services.

The defendant's counsel insisted that the action could not be maintained, 1st, because it was for the *tort* of an agent for which he held the principal not liable. 2d, because from the evidence in the case, it did not fall within any of the acts of Assembly in this State, and could not be maintained as an action at common law.

But if the action could be maintained, he moved the court to charge the jury as a rule of law, that the defendant was only liable to the amount of the loss of time and expense in going to Prince Edward Court House and back, and not for the residue of the trip, for which others were responsible.

Upon the first point the court charged that a principal was liable for the *torts* of an agent, while in his employment and doing his business. On the second, the court charged that, if the evidence was believed, the plaintiff had made out a cause of action; that it is a principle of law that when one
(242) person caused damage to another by an act, which he had no right to do, he was responsible for the injury; and

in this case the defendant had no right to carry off the slave of the plaintiff in the stage without her permission.

As to the damages, the court charged the jury that questions of damages were in most cases left to the jury, because no rule could be fixed on by which to measure them. The plaintiff had a right to expect full compensation for the injury caused by the wrongful acts of the defendant, and to be placed in the same situation as nearly as could be, as if the defendant had not interfered; that where there were circumstances of aggravation, juries were authorized to go further and give vindictive damages; but in this case, the plaintiff did not insist on vindictive damages, for it was not alleged that the defendant had acted wrong, knowingly and wilfully, that the fact, supposing it to be so, that the stage owners from Prince Edward Court House to Baltimore were liable to the plaintiff's action, should not affect the amount of damages; for, where there were two wrong doers, the person injured had a right to his election, and to make either pay all the damages that would properly be considered the consequence of his act.

There was a verdict for the plaintiff. Damages $235. A motion was made for a new trial and overruled, a judgment for the plaintiff and an appeal by the defendant to the Supreme Court.

Barringer for the plaintiff.
No counsel for the defendant.

DANIEL, Judge. The defendant's counsel insisted in the Superior Court, that the plaintiff could not recover, because the action was for the *tort* of an agent, for which, he insisted, the principal was not liable. We are of opinion that the Judge correctly overruled this objection. It is true that the master is not liable for an actual trespass, which his servant may commit, without his previous command or subsequent assent, (*McManners* v. *Cricket*, 1 East., 107,) but a master is liable in an
(243) *action on the case* for the tortious acts, negligence or unskilfulness of a servant, acting in the prosecution of his service, or in the exercise of the authority he has given him, though not under his immediate direction. 8 Durn & East., 188; 1 L'd Ray., 264; *Croft* v. *Allison*, Barn. & Ald., 590; Paley on Agency, 295, (2d Amer. Edit.,) *Bush* v. *Steenman*, 1 Bos. & Pul., 404. The declaration states that the defendant did wrongfully and negligently permit the plaintiff's slave (without the assent of the plaintiff) to enter his stage coach, (in which he

carried passengers for a reward) and did carelessly and improperly transport the said slave from the county of Cabarrus to parts beyond the limits of this State; in consequence whereof the plaintiff sustained damages, &c. The evidence was, that the defendant's drivers and stage agents were guilty of gross negligence in taking the slave past Salisbury, (where her pretended pass was at an end) and permitting her to travel on in defendant's stages to the State of Virginia. We think that the defendant was liable at common law to an action for the injury.

Secondly, it was contended that, if the plaintiff could recover in this action, then the defendant should not be liable for *all* the damages she had sustained, in time lost and expenses incurred in sending an agent to Baltimore for the slave, as the slave left the defendant's line at Prince Edward, in Virginia, and then entered on a different line, which conveyed her to Baltimore; and that the plaintiff could recover damages of the owner of the last line. On this point the Judge charged the jury that the plaintiff had a right to expect full compensation for all the injury sustained by the wrongful acts of the defendant's servants in doing his business, and to be placed in the same situation as she would have been in, if the defendant's agent had not interfered; that the plaintiff had a right to recover all such damages, as could properly be considered the consequence of the act of the defendant's agents, while in his service. We see nothing erroneous in this charge; for the jury might fairly consider that the first wrongful act, done by the defendant's servants, was the substantial cause of all the injury the plaintiff had sustained. We think the judgment must be affirmed.

PER CURIAM. Judgment of the Superior Court affirmed.

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(244) Den ex dem. MARGARET BOLICK *vs.* JOHN BOLICK.

1. A testator devised to his wife as follows: "It is my will and desire that my loving wife Margaret, shall retain and keep in her possession all that I may be possessed of at my death (my debts and funeral expenses being first paid), during her natural life." It appeared in evidence that the testator had lived for many years, and at the date of his will and at the time of his death, on a certain plantation. The will was made in 1815. In 1811, upon the marriage of his son, the defendant in this case, he had permitted him to occupy a small portion of the plantation, with an understanding that his son was to remove as soon as he built a house on his own land. In 1813 the testator insisted the son should remove, which he refused to do until his house should be completed, which would be in 1814. The testator, and not the defendant, always gave in the land for taxation and paid the taxes. *Held* that under the words of this devise

the land passed, and that from other clauses of the will and the parol testimony, it was clear the testator intended to devise the part occupied by his son, which occupation was in fact only the possession of the testator.

2. *Held* also that parol testimony is admissible to explain an obvious ambiguity of expression, as to the description of the subject of a devise, as for instance to shew the situation or occupation of the land at any given time, or whether parcel or not parcel of the subject devised.

This was an action of EJECTMENT brought to January Term, 1839, of Lincoln County Court, and after a trial in the County Court, carried by appeal to the Superior Court of Law of Lincoln, where at the Fall Term, 1840, his Honor Judge PEARSON presiding, a verdict was rendered for the plaintiff, and judgment being given for him, the defendant appealed to the Supreme Court. The following is the case submitted to the Supreme Court:

This was an action of Ejectment. The defendant admitted himself to be in possession, and the only question made was on the proper construction of the will of one Sebastian Bolick, as to which the facts were presented as a case agreed, and a verdict was rendered for the plaintiff, subject to be set aside an a nonsuit entered, should the court be of opinion for the defendant upon the case agreed, which was as follows: Sebastian
(245) Bolick owned a tract of land in the county of Lincoln, upon which he resided many years, and upon which he was living at the time of his death. About the year 1811, upon the defendant's marriage, Sebastian, defendant's father, permitted him to take possession of a small house, situated at some distance from the house and cleared land of Sebastian, and to cultivate a field around the house, twenty acres, with an understanding that the defendant was to remove from the premises as soon as he built a house upon his own land. The defendant has lived in the house and cultivated the field ever since. About 1813 Sebastian insisted that defendant should leave the premises. The defendant refused to move off then as requested by his father to do, but promised that he would, as soon as he completed the house on his own land, which would be about 1814. Sebastian died, having duly made and published his last will, which was duly admitted to probate; the will among other clauses contains the following: "I give all that I am in possession of at my death to my wife her life." After the death of Sebastian, his wife, who is the lessor of the plaintiff, continued to live in the house and cultivate the part of the land owned by Sebastian in his lifetime, and the defendant lived in the house and cultivated the field, which was in his occupation at the death of Sebastian,

without objection on the part of the lessor of the plaintiff, who was his mother, until about one year before the commencement of the present action, when the lessor of the plaintiff ordered him to leave the premises, and he refused to do so, and denied her right to the land. Sebastian gave in for taxation and paid the tax for the whole tract during his lifetime. The defendant did not give in nor pay the tax for any part of the tract. The court was of opinion, upon this statement of the facts, that the land in controversy, being the house and field, occupied by the defendant, passed to the lessor of the plaintiff, as well as the other part of the tract, under the description mentioned in the will, as being in possession of the testator at the time of his death.

Copy of the last will and testament of Sebastian Bolick, referred to in this case,

In the name of God, amen: I Sebastian Bolick, of Lin-
(246) coln County, in the State of North Carolina, being advanced in years and of sound mind and memory (thanks be unto God for the same), and knowing that it is appointed for all men once to die, I do make and ordain this my last will and testament in the manner and form following: That first and principally, I do will and bequeath my soul into the hands of Almighty God, who gave it unto me, and my body I commit unto the earth from which it was taken, to be buried with decent Christian burial, at the discretion of my executors hereafter named; and as to what worldly property it has pleased God to bless me with in this life, I do give and dispose of the same as follows, which is, that it is my will and desire that my loving wife Margaret shall retain and keep in her possession all that I may be possessed of at my death (my debts and funeral expenses being first paid), during her natural life, my youngest daughter, Susannah, excepted, unto whom I give and bequeath one good feather-bed and bedding, &c., (going on to describe several small articles of personal property,) to be paid and delivered to her when she comes of age or marries, which first happens. I give and bequeath to my two sons, Michael Bolick and John Bolick, the land I am possessed of at my decease, the rights for which are deposited in their mother's hands, and are to be delivered to them after their mother's death, or before, if she sees it proper and safe so to do. I give and bequeath unto my daughters Christiana Barger, Margaret Bowman and Elizabeth Bowman, over and above what they have already received in my life time, their shares as shall be hereafter mentioned. And it's my car-

nest will and desire that after my wife's decease, that all (except the land and what is above bequeathed to my daughter Susannah,) the property by her left shall be sold and an equal divide thereof made amongst all my children, Michael Bolick, Christiana Barger, Margaret Bowman, John Bolick, Elizabeth Bowman and Susannah Bolick; and I do hereby nominate, constitute and appoint my dearly and well beloved wife, Margaret Bolick, to be sole executor of this my last will and testament, hereby revoking, disannulling and making void all former wills,
(247) legacies or bequests by me made or done, ratifying and confirming this to be my last will and testament.

[This will was dated 13th February, 1815, signed by the testator, and duly executed in the presence of two subscribing witnesses.]

No counsel for the plaintiff.
Hoke and Saunders for the defendant.

DANIEL, Judge. The words used by the testator are admitted to be sufficiently comprehensive to carry the land as well as the personal estate to his wife. 1 Brown's Ch. Ca., 439; 2 Powell on Dev., 180. The dispute is, whether the land, which was occupied by the defendant, at the date of the will and at the death of the testator, passed by the words used by him. The defendant did not, at any time, pretend to hold the land adversely to his father, and, in truth, the defendant's occupation was, in law, the father's possession. The father was authorized by law to dispose of it by his last will; and that he intended to devise it to his wife for life by the words which he used, we think is rendered still more apparent from the subsequent clauses in his will, relating to the dispositions of the remainders of his real and personal estate. The first is a devise to his two sons, John and Michael; and he gives to them as follows: "The land I am possessed of at my decease, the rights of which (title deeds) are deposited in their mother's hands, and are to be delivered to them *after their mother's decease*, or before, if she sees it proper and safe to do so." This clause shews that the testator did not intend that either the defendant or his brother should have any of his land, until the death of his wife, without her leave. Then comes the clause disposing of the remainder of the personal estate as follows: "It is my will and desire that after my wife's decease, that all (except the land and a small specific legacy to his daughter Susannah) the property by her left shall be sold and equally divided among all my chil-

dren." It is apparent that the testator did not intend to die intestate as to any portion of his estate; which would necessarily be the case, during the life of the wife at least, as to the
(248) land in controversy, if the construction of the will as to this subject, was to be made as the defendant insists it should be. It is true that when a given subject is devised, and there are found two species of property, the one technically and precisely answering the description in the devise, and the other not so exactly answering that description, the latter will be excluded, though, had there been no other subject upon which the devise could have operated, it might have been held to comprehend it. 2 Pow. on Dev., 196. It is on the aforesaid doctrine, we suppose, that the defendant resists the plaintiff's recovery. But the facts of the case, as shewn by the other parts of the will, and the parol evidence, exclude the defendant from the benefit of the rule; for the rule is to be enforced only where there is no other evidence to explain the description of the subject. Parol evidence is admissible to explain an obvious ambiguity of expression, as to the description of the subject of a devise; a reference to the actual state of the facts is not construction, but explanation. And on this principle, parol evidence, shewing the situation or occupation of the land at any given time, has always been admitted. So whether parcel or not parcel of the subject devised. Coventry on Con. Ev., 30, 31. We are of the opinion that the decision of the Superior Court was correct, and that the judgment must be affirmed.

PER CURIAM. Judgment of the Superior Court affirmed.

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(249) NATHANIEL TAYLOR to use of THOMAS BOGUE *vs.* GEO. M. WILLIAMS.

1. The person, who has the legal title to property sold under execution, has alone the right to recover the balance that remains from the proceeds of the sale, after satisfying the execution.
2. Where A. fraudulently conveyed a slave to B., and A.'s creditors afterwards caused the slave to be sold by execution, and the slave sold for more than enough to satisfy the execution, *it was held* that B., the fraudulent vendee, and not A., the fraudulent vendor, had a right to recover the balance, because as between A. and B. the legal title was vested in B.
3. And an order by A. on the officer for this balance in favor of B., and presented by B., does not alter the case, for these acts do not transfer to A. the legal title, which is necessary to support the action.

This was an action, tried at Fall Term, 1840, of Chowan Superior Court, before his Honor Judge BATTLE, having been

brought to recover a balance remaining in the hands of the defendant of the proceeds of a negro, levied upon and sold by him, as constable, under divers executions issued by justices of the peace against the plaintiff.

In support of the action, the plaintiff produced the judgments and executions against himself, and the returns of the defendant, as an officer, on the said executions, shewing that he had levied upon a negro girl, as the property of the present plaintiff, and had sold her for an amount more than sufficient to satisfy the executions which he held, leaving a balance in his hands of one hundred and seventy-three dollars forty-three cents. The plaintiff then proved that he had given an order on the defendant for the said balance in favor of one Bogue, who thereupon demanded the money of the defendant, in the name of the plaintiff, when the defendant refused to pay it. The defendant then produced and read in evidence a bill of sale from the plaintiff to Bogue for the negro girl in question and four other negroes, executed a few months previous to the judgments and executions aforesaid against the plaintiff; and insisted that Bogue, and not the plaintiff, was entitled to the balance in his hands, and that
(250) therefore the action in the name of the plaintiff, Taylor, could not be sustained, and this, whether the conveyance from Taylor to Bogue was fraudulent or not as against creditors.

The Court held and so instructed the jury that the general rule was, that the defendant in an execution was entitled to any balance, that might remain in the hands of the officer after satisfying the executions, and that the officer could not protect himself from the claim of the defendant in the executions, he having levied upon and sold the property as his, by shewing a previous conveyance of the goods from him to another person; for that if he were bound to pay over the balance remaining, after satisfying the executions in his hands, to a previous purchaser from the defendant, he would have to decide upon the genuineness and validity of the assignment, and would therefore have to act at his peril, whereas, the rule, that requires him to pay the balance to the defendant in the execution, makes it always certain whom he is to pay, and therefore relieves him from the responsibility of deciding among conflicting claims: that in this case, the alleged assignee made a demand of the money in the name of his assignor, thereby shewing that he set up no claim for himself under the alleged conveyance, so that if the rule was not as above stated, yet in this case the officer had no excuse for not

paying the money to the defendant in the executions, and that therefore the action was well brought in the name of such defendant.

There was a verdict for the plaintiff, motion for a new trial, which was overruled, and judgment for the plaintiff, from which the defendant appealed to the Supreme Court.

A. Moore for the plaintiff.
Heath for the defendant.

DANIEL, Judge. This was an action of assumpsit to recover money had and received by the defendant to the use of the plaintiff. Plea non assumpsit. The case was as follows: Taylor, to defraud his creditors, conveyed by deed a negro girl to one Bogue.

(251) The creditors of Taylor placed their executions in the hands of the defendant, who was a constable. He levied them on the aforesaid slave and sold her. After satisfying the executions, there was a balance of money in his hands of $173.43 cts. Taylor drew an order on the defendant to pay this balance to Bogue; the defendant refused to pay as directed, whereupon Taylor brought this action. And the Judge charged the jury that the plaintiff was entitled to recover, as it was a balance of the sale after satisfying the executions against himself.

We do not agree with the Judge, who tried this cause. By the Stat., 13 Eliz. (see Rev. St., ch. 50, s. 1,) the bill of sale of the slave was void only as to the creditors, who were intended to be defrauded; it was good as between Taylor and Bogue, and transferred all the title Taylor had in the slave. When Taylor's creditors had carved out of the property their demands, by force of the statute, the title to the balance remained where it had before been legally vested, to wit, in Bogue. The order Bogue brought to the defendant from Taylor was not of itself evidence that the aforesaid balance belonged to Taylor; for as between him and Bogue, he would have been estopped by his deed to say, that the slave, or any of the proceeds of her sale, was not the property of Bogue. The presentation of that order by Bogue cannot amount to an assignment of Bogue's legal right to the money to Taylor, so as to enable the latter to maintain an action for it.

The difficulty in which officers might be placed, in investigating titles to property, if the law was not as the Judge charged, is no answer to the legal demand of Bogue. The constable in

this case, as in every other case in which he acts, must proceed at his peril. There must be a new trial.

PER CURIAM. Judgment of the Superior Court reversed and new trial awarded.

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(252) Den on dem. of JOHN EVERITT *vs* GEORGE THOMAS.

1. By a proper reference of one deed to another, the description in the latter may be considered as incorporated into the former, and both be read as one instrument, for the purpose of identifying the thing intended to be conveyed.
2. But there must be no inconsistence between the calls of the latter deeds and the former deeds or grants; as, for instance, where the former deed or grant calls for a line of another patent and the latter deed omits that call, but goes for a particular course and distance, and only professes to convey a part of the tract embraced by the grant or former conveyance. In such a case the course and distance called for, being the specific description in the deed, must prevail.
3. The cases of *Ritter* v. *Barnet*, 4 Dev. & Bat., 133, and *Campbell* v. *McArthur*, 2 Hawks, 33, cited and approved.

This was an action of Ejectment, tried at Fall Term, 1840, of Richmond Superior Court of Law, before his Honor Judge SETTLE, in which there was a nonsuit, and the plaintiff appealed to the Supreme Court.

The lessor of the plaintiff deduced title as follows, to wit:

1st. A grant in favor of George Webb, bearing date the 18th day of April, 1771, describing the land as follows, to wit: between the south prong of Cartledge's creek and Baggett's branch, No. E. of Pedee River, beginning at a black-jack by Crawford's corner a dead hickory, and runs thence No. 60 E. 19 chains 79 links near three black-jacks, then No. 30 W. 44 chains 73 links to a stake among 4 pines, *then So. 60 W't 10 chains by a pine in Jackson's line, then with it So. 35 West 27 chains to a stake among three pines*, then So. 60 West 18 chains and 23 links, then So. 30 East 33 chains and 30 links, then No. 60 East 33 chains 30 links to the beginning.

2d. A deed from George Webb to Lawrence Everitt, dated Jan. 25th, 1780, describing the land *in totidem verbis*, as in the patent; and also as 200 acres of land granted the said George Webb by patent, dated 17th April, 1771.

3d. The will of Lawrence Everitt, dated May 31st, 1800, and admitted to probate September, 1803, giving the land to his four children, William, Lawrence, Elizabeth and Han-
(253) nah; Elizabeth had since intermarried with Jesse Williams, and was still alive; Mrs. Williams, the widow of Lawrence, was dead.

4th. A deed from William Everitt, Lawrence Everitt and Jesse Williams, to William Everitt, dated in 1810, the descriptive parts of which are "a part of a tract of land, the said tract containing 200 acres, was granted unto George Webb, from Webb to William Thomas, from Thomas to Lawrence Everitt, dec'd, to William and Lawrence Everitt and Jesse Williams, his sons, three of the legatees. Beginning at a stake and runs No. 60 East 29, 79 to three black-jacks, thence No. 30 West 44, 73 to a stake, thence South 60 W. 10 poles, thence South 37 West 27 chains to three pines, then South 60 West 18, 23, thence South 30 East 33 chains and 30 links, thence North 60 East 33 chains 30 links to the beginning, the same containing two hundred acres, more or less; the said William and Lawrence Everitt and Jesse Williams, their heirs and assigns forever, do bargain, sell and convey unto William Everitt one hundred and fifty acres out of the above two hundred acres, three children's part at the death of Mary Williams, formerly the wife of Lawrence Everitt, the mother of William and Lawrence Everitt and Jesse Williams."

5th. A deed from William Everitt to John Everitt, the lessor of the plaintiff, dated in 1824, which described the land as follows: "a piece or parcel of land containing one hundred and fifty acres, being three fourths of a tract of land of two hundred acres, which Lawrence Everitt, sen., owned at his death; and the part hereby conveyed being the parts formerly belonging to William Everitt, sen., Lawrence Everitt, Jun., and Jesse Williams, in right of his wife in the aforesaid tract; for the boundaries of the said one hundred and fifty acres of land, reference is to be had to the deed of conveyance from the aforesaid legatees, except that fifty acres of said land is encumbered with the life estate of Mrs. Molly Williams, formerly the widow of the said Lawrence Everitt, sen."

6th. A deed from Hannah Everitt to the lessor of the plaintiff, dated in 1827, and describing the land conveyed
(254) as follows: "a part of a tract of land, the said land containing two hundred acres, granted unto George Webb, from Webb to William Thomas, from Thomas to Lawrence Everitt, dec'd, and then the said tract beginning at a stake and runs No. 60 East 19, 79 to the three black-jacks, then North 30 West 34, 73 to a stake, thence So. 60 West 18, 23, thence So. 30 East 33, 50, then No. 60 East 33, 20 to the beginning, the same containing two hundred acres, more or less, and my part being the fourth of the above described tract of land, willed to me by my father, Lawrence Everitt." 199

Upon the trial in the Superior Court, two questions arose. The first question was, whether the mesne conveyances passed all the interest of the bargainors under the Webb patent, or only so much thereof as was covered by the courses and distances set forth in said deed. This question his Honor reserved, and directed the parties to go on with the investigation of the other question, with the understanding that the verdict should be set aside and judgment rendered for the defendant, if such verdict should be in favor of the plaintiff, and the court should be of opinion that the mesne conveyances passed only so much of the interest of the bargainors as was contained within the courses and distances set forth.

The other question was, whether the third line of the Webb patent stopped at the end of its course and distance, or *extended to Jackson's* line. And in the latter case, it was proved that the third line of the Webb patent would be twice as long as in the former case. Upon the charge of the Judge on this question, the jury gave a verdict for the plaintiff.

On the reserved question the Judge was of opinion that the special description by course and distance in the mesne conveyance, controlled the more general description by reference to other conveyances, and that consequently they did not cover the land in dispute; and he set aside the verdict, and entered a judgment for the defendant, from which the plaintiff appealed.

A plat of survey was annexed to the case, but it is deemed unnecessary to insert it, as the only question determined by the Supreme Court was, whether the mesne conveyances
(255) to the lessor of the plaintiff covered the same land that was covered by the grant to Webb.

Strange for the plaintiff.
No counsel for the defendant.

RUFFIN, Chief Justice. If it be admitted that the grant to Webb covers the land in dispute, yet if the deeds to the lessor of the plaintiff do not also cover some part, he has no title, and the verdict ought to have been for the defendant. Upon this last point we entertain the same opinion his Honor gave; and, as that is decisive against the action, it is unnecessary to consider the other point.

It is clear that according to the description by metes and bounds, contained in the deeds to the lessor of the plaintiff, neither of them embraces any portion of the land in controversy. In the grant the third line runs South 60 West *ten chains by a*

pine in Jackson's line, thence *with it* South 35° West &c. It is by the force of these calls, if at all, that the patent covers the land in possession of the defendant. Now the deed from the sons, if it be admitted to run with the patent to the second corner, runs "thence South 60 West *ten poles*" instead of ten chains, and *does not call for Jackson's line*, nor for any object to control course and distance. It must therefore stop at the end of the distance, and then run so as to leave out the whole land in dispute. The deed from Hannah Everitt is still more defective. In the grant the second line runs North 30 West *forty-four chains and seventy-three links* to a stake *among four pines*. In this deed it runs the same course *thirty-four chains* and seventy-three links, and the pines are not called for but a stake only. Stopping ten chains short of what is called for it the patent, (supposing this last to include the land in dispute), it is obvious that the disputed land cannot be included, even if the subsequent calls in the deed corresponded with those in the patent. The deed omits the two next lines altogether, and describes the tract as having, instead of six, only four, lines.

But it is urged that these defects are supplied by the reference to the grant to Webb and by other general terms, which, it is said, denote an intention to convey all the land
(256) the bargainors derived from Lawrence Everitt, namely, the whole tract granted to Webb. We do not doubt, that, by a proper reference of one deed to another, the description of the latter may be considered as incorporated into the former, and both be read as one instrument for the purpose of identifying the thing intended to be conveyed. That was done in *Ritter* v. *Barnett*, 4 Dev. & Bat., 133, and in *Campbell* v. *McArthur*, 2 Hawks, 33. But in those cases, the calls in the several deeds were not inconsistent with each other, and there was a manifest intention to convey the *whole or a certain part* of the particular tract described in the grant or deed referred to. Therefore such a reference was allowed to help an imperfect description, so as to make it conform to the principal intention. But, in this case, the calls of the patent and the deeds are absolutely inconsistent, and cannot be reconciled. Moreover each deed sets out with the declaration that the bargainors meant to convey "*a part of a tract of land*," and not the whole tract that was granted to Webb; and then it proceeds to give a specific description by courses and distances, which do in fact include a part and but a part of the land granted to Webb. It may be possible and probable that the part was such part of the whole

tract, as the bargainors were respectively entitled to. But that is not said, and can only be conjectured; and, without a plainer guide than mere conjecture, we are not at liberty to depart from the terms of special description contained in the deeds.

PER CURIAM. Judgment of the Superior Court affirmed.

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(257) MARY MITCHELL *vs.* ESTHER MITCHELL & al.

A devise of "all my property of any nature or kind whatsoever, which deeds, papers and moveables will shew," can, by no intendment nor construction, be taken to indicate an intention in the testator to devise the land, which belonged to his wife.

This was a petition for dower, originally filed in the Court of Pleas and Quarter Sessions of Gates county, and taken thence by appeal to the Superior Court of Gates, where it was heard at Spring Term, 1840, before his Honor Judge PEARSON. The petitioner claimed to be endowed of a tract of land, of which she alleged her late husband John died seized and possessed, and which he had held as a tenant in common with the defendant, Esther Mitchell. Esther Mitchell in her answer denied that John Mitchell ever was seized of the said land. It appeared, on the hearing, that the land in question belonged to the defendant, Esther Mitchell, previous to her intermarriage with her late husband, Richard Mitchell, and that she had not made any conveyance by which she had parted with her title; that the said Richard Mitchell died some years before his son John, and that he had made a last will and testament, executed in due form of law to pass real estate, and which had been admitted to probate in the proper court. In and by said will, among other things, he devised and bequeathed as follows: "After paying my just debts, legacies and expenses, I leave all the balance of my property of any nature or kind whatsoever, which deeds, papers and moveables will shew, to my wife, Esther Mitchell, and her heir, John Mitchell." The personal property bequeathed by this clause was equally divided between the said Esther and John, and they both continued to reside upon the land in question, from the time of the death of Richard Mitchell until the death of John Mitchell.

The Judge below being of opinion, that by taking the personal property bequeathed to her in the will, the said Esther had elected that her land should pass by the devise in the
(258) will, that thereby John Mitchell acquired an equitable interest therein, of which by our act of Assembly of

1828, 1 Rev. St., c. 121, s. 6,) his widow might be endowed, gave judgment for the petitioner and directed a writ of dower to issue. From this judgment the defendant, Esther Mitchell, appealed to the Supreme Court.

Kenney for the plaintiff.
A. Moore for the defendant.

DANIEL, Judge, after stating the case, proceeded: We are of opinion that the Judge put a wrong construction on this clause in Richard Mitchell's will. The words "my property of any nature or kind whatsoever, which deeds, papers and moveables will shew," by no intendment nor construction can be taken to indicate an intention in the testator to devise the land which belonged to his wife. This being our opinion, it becomes unnecessary to decide the other question raised in the cause, whether dower under the statute in trust or equitable estates could be recovered in any other way than bill in equity. The judgment must be reversed, and, upon the case agreed, judgment given for the defendant.

PER CURIAM. Judgment for the defendant.

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(259) Den ex dem. of J. H. LEARY and WIFE *vs.* FRANCIS FLETCHER.

1. The County Court, in proceeding under the act of 1789, (Rev. Stat., c. 63, s. 11,) authorizing an order to issue to a guardian empowering him to sell the property of his ward for payment of the debts of the ward, must first ascertain that there are debts due by the ward which render the sale of the property expedient; and the court must also select the part or parts of his property, which can be disposed of with least injury to the ward.
2. Therefore an order of the County Court in the following words: "Ordered that A. W. (the *guardian*) have leave to sell as much of the lands belonging to the orphans of Stephen Mullen, dec'd, as will satisfy the debts against said deceased's estate" is unauthorized by law, and void; and a purchaser under a sale, made by the guardian in pursuance of such order, acquires no title.

This was an action of Ejectment, tried at Pasquotank Superior Court of Law, at Spring Term, 1840, before his Honor Judge PEARSON, for certain lands described in the declaration, of which defendant admitted he was in possession.

It was admitted that the lands in dispute had once belonged in fee simple to the father of the plaintiff Elizabeth, and descended to her as his heir, and defendant had purchased the same of her guardian, as hereafter set forth at a fair price, and

in good faith; and the only question was whether the guardian could lawfully sell the land, under the order of the court herein set forth. Addison Whidbee was duly appointed guardian of the plaintiff Elizabeth, and acted as such up to the time of her marriage with the plaintiff John, and obtained the order of the County Court, recited below, under which order he sold and conveyed the lands to the defendant's father, A. Fletcher.

The defendant proved that Ambrose Knox was the administrator of the father of the plaintiff Elizabeth, from whose father the lands descended, and offered in evidence a judgment against the said administrator, for about $260 and costs, in which
(260) the plea of fully administered had been found in favor of the administrator, and the claim prosecuted to judgment against the heirs of the father of the said Elizabeth, one of the lessors of the plaintiff. The defendant further proved that the administrator claimed the sum of eleven hundred dollars, due to him from the estate of his said intestate, more than he had personal assets to satisfy, at the time the order of the County Court was granted and the sale made; but also shewed that his claim was afterwards paid by assets coming to his hands, which at that time were known neither to the administrator nor to the guardian. It also further appeared that the guardian had paid off the judgments out of his own funds, before he had obtained the order of sale. The amount for which the land sold was eighteen hundred and twenty-six dollars and some cents.

The following order of sale from the County Court of Pasquotank was produced in evidence, as the order under which the guardian acted:

Pasquotank County Court—September Term, 1824.

Ordered that Adderson Whidbee have leave to sell as much of the lands belonging to the orphans of Stephen Mullen, deceased, as will satisfy the debts against said deceased's estate.

Upon these facts, his Honor Judge PEARSON was of opinion that the order of the County Court was valid, and the sale under the order conveyed the title of the plaintiff Elizabeth.

The jury, in pursuance of the charge of the Judge, found for the defendant. There was a motion for a new trial, which was overruled, and judgment having been rendered for the defendant, the plaintiff appealed to the Supreme Court.

A. Moore for the plaintiff.

Kinney for the defendant.

GASTON, Judge. The only question in this case is, whether the estate, which the female lessor once had in the premises, was transferred to the defendant under the sale and conveyance of her guardian. This question depends upon the enquiry
(261) whether the order of sale, made by the County Court of Perquimons, did or did not transcend the power of the court. If the court were competent to make the order, the sale under it must be held valid, although the guardian might have sold more than was necessary to effectuate the objects of the sale. The purchaser was bound to look no farther than to his authority, and had no control over the exercise of his discretion, while acting within the limits of that authority. The power of the court to make the order, if it exists at all, is derived from the act of 1789, ch. 311, sect. 5, (Rev. Stat., ch. 63, sect. 11.) It seems to us that this act does not confer on the court a *general* power to make orders of sale, but confers a power, limited in its terms and restricted by its objects, to make orders, to sell designated parts of an orphan's estate to pay ascertained debts against such estate. The material enactments of it are, that "when a guardian shall have notice of any debt or demand against the estate of his ward, he may apply to the court for an order to sell *so much* of the personal or real estate of such ward, as may be sufficient to discharge *such debt or demand*"—and such order of court shall "*particularly specify* what property may be sold." It is obvious that the Legislature intended, and therefore we hold that the Legislature required, that the judgment of the court should be exercised in deciding whether there were any debt or demand against the estate of the ward to render a sale of his property expedient—and if so, then in selecting the part or parts of his property, which could be disposed of with least injury to the ward. The order before us manifestly departs from both these requisitions. If valid, it authorizes the guardian to sell any part he pleases of the ward's land, which he may deem necessary for the payment of debts against her father's estate. The court, instead of exercising its own discretion on the subjects, whereon the Legislature required it to act, has undertaken to delegate that discretion to the guardian. This cannot legally be done. *Delegatus non potest delegare.*

The judgment below must be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment accordingly.

(262) SPEAR AND PATTON *vs.* JOHN ATKINSON & al.

1. Notice by the holder to the drawer of a bill of exchange of a demand on the drawee and a protest for non-exceptance or non-payment is not necessary, when the drawer had no funds in the hands of the drawee, unless the drawer had reasonable grounds to believe that his bill would be honored.
2. Where a creditor of a firm for goods sold and delivered, had taken the promissory note of the firm in settlement of the account, and had, after the dissolution of the firm, taken a bill of exchange drawn by one of the late partners in his own name, which was protested for want of funds of the drawer, and had delivered up the promissory note, such creditor's original claim was not merged by the promissory note or bill of exchange, but he is entitled to recover for the price of the goods sold and delivered, provided he has surrendered such bill of exchange,
3. But it is essential to the recovery of the creditor, that he should have surrendered the bill of exchange to the defendants, either before or at the time of the trial.
4. Notice of the dishonor of a bill is required to enable the drawer or endorser to withdraw their effects from the drawee.
5. Taking a promissory note or bill of exchange for an antecedent debt does not merge that debt, but on failure of the note or bill, the original debt may be recovered.

This was an action of Assumpsit, tried at September Term, 1840, of Pitt Superior Court before his Honor Judge HALL, when the plaintiffs, under an intimation from the court, submitted to a nonsuit and appealed to this court. The facts of the case are stated in the opinion of this court, delivered by his Honor Judge DANIEL.

J. H. Bryan for the plaintiff.
J. R. J. Daniel for the defendant.

DANIEL, Judge. This was assumpsit for goods sold and delivered. Plea—*non assumpsit*. The plaintiffs, on the first of April, 1836, sold goods to the firm of Joseph and John Atkinson, of Pitt county, who were the defendants in this action. The firm of the Atkinsons was dissolved in September, 1836. On the 15th of April, 1837, the two Atkinsons gave to the plaintiffs their promissory note for the price of the goods. Some payments were made on the note, which reduced it to the sum of $500. And on the 18th of June, 1837, John Atkinson, in his own name, drew a bill of exchange in favor of the plaintiffs (263) on Mitchell and Company of New York, for $500 at 60 days, and took up the promissory note. When the bill fell due, it was duly presented for payment, but payment was refused for want of funds of the drawer. No notice was given to the drawer of the dishonor of the bill. There was no

proof that the bill had been returned to the drawer, or that the plaintiffs offered to surrender it at the trial.

The plaintiffs were nonsuited and appealed.

Notice need not be given to the drawer of a bill of exchange, when he has no effects in the hands of the drawee, unless he had reasonable grounds to believe the bill would be honored. Notice is required to enable the drawer and endorsers immediately to withdraw their effects from the drawee. But if the drawer had no effects in the hands of the drawee from the time the bill was drawn until it became payable, he could not be prejudiced for the want of notice; and consequently, under such circumstances, he is not entitled to any. *Bickerdike* v. *Bollman*, 1 T. R., 405; *Legge* v. *Thorpe*, 12 East., 171; Chitty on Bills, 467; Leigh's Nisi Prius, 452, note 1, where are to be found the names of all the American cases on this subject.

Secondly, there is no evidence in the case that the plaintiffs agreed to take the bill in discharge of the antecedent debt due them from the two Atkinsons.

If the plaintiffs, therefore, had surrendered the bill, even on the trial, they might have recovered upon the original consideration. For the taking of the note first and then the bill, did not merge the original consideration, as a bond would have done. But as this negotiable bill is still outstanding, and may be in the hands of an innocent indorsee or holder, we are of opinion, from the cases, that the plaintiffs cannot recover, and that the nonsuit must stand. *Holmes* v. *De Camp*, 1 Johns. Rep., 34; *Angel* v. *Felton*, 8 Johns. Rep., 149; *Pintard* v. *Tackington*, 10 Johns. Rep., 105; *Burdick* v. *Green*, 15 Johns. Rep., 247; *Hughs* v. *Wheeler*, 8 Cowen's Rep., 77; 3 Cowen's Rep., 147. The judgment must be affirmed.

PER CURIAM. Judgment of nonsuit affirmed.

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(264) STATE *vs.* JAMES R. LOVE.

1. A person may confess a judgment or a recognizance on record to the State for a sum of money, as well as to an individual.

2. Therefore where A. was convicted on an indictment and fined, and ordered into the custody of the sheriff, and B., in consideration that A. should be discharged from custody, confessed a judgment to the State for the fine and costs, *it was held* that this judgment could not afterwards be set aside.

This was an appeal from a decision made by his Honor Judge BAILEY, at the Fall Term, 1840, of Haywood Superior Court of Law, overruling a motion made by the defendant to set aside

a judgment entered against him at the preceding Term of that court. The facts are stated in the opinion delivered in this court by DANIEL, Judge.

The Attorney General for the State.

Francis for the defendant.

DANIEL, Judge. One *Underwood* was convicted (at Spring Term, 1840, of Haywood Superior Court,) upon an indictment for an assault and battery, and was fined five dollars and costs. He was committed to the custody of the sheriff, until the fine and costs were paid. The defendant, in consideration of *Underwood's* discharge from custody, agreed to confess, and did confess, a judgment to the State for the said sum and the costs to be taxed by the clerk. On this judgment a *fieri facias* issued. The defendant at the next term moved the Superior Court of Haywood to set aside the judgment on these grounds: *First*, that it was illegal or irregular to take such a judgment; secondly, that some of the officers of the court told the defendant, before he confessed the judgment, that the costs would be but $15, when in truth the costs were $35. The court overruled the motion, and the defendant appealed.

We see no reason why a person may not confess a judgment or recognizance on record to the State for a sum of
(265) money, as to an individual. The fine and costs against Underwood was money due to the State; and the Solicitor (as its agent), had the power, by exercising a sound discretion, to secure the money due by taking this judgment.

Secondly. It did not appear that the declaration of the officer of the court, that the costs were but $15, was made with an intent to defraud the defendant, or that he would not have confessed the judgment, if he had known that the costs were $35. We see no fraud nor undue means made use of to induce the defendant to enter up the judgment. Therefore the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

BENJAMIN S. BRITTAIN *vs.* DAVID MCKAY AND JOHN BATES.

1. A purchaser of a growing crop of corn, at an execution sale, must declare in trespass on his personal chattels, against one, who tortiously severs the corn from the stalks and throws it on the ground.

2. A grant of the vesture or herbage of land passes a particular right *in the land itself*, and for that purpose also "a particular possession and occupation" of the land itself. Such a grantee may therefore maintain trespass *quare clausum fregit* for any interruption of his possession.

3. But there is a distinction between those profits, which are the spontaneous products of the earth, and the corn, &c., which are produced annually by labor and industry, and thence are called *fructus industriales.* The latter are, for most purposes, regarded as personal chattels, and a sale of them, while growing, is only a sale of goods.
4. The case of Smith *vs.* Tritt, 1 Dev. & Bat., 241, cited and approved.
5. He, who directs, aids or encourages another in the commission of a trespass, is himself a trespasser.

This was an action of Trespass, tried at the Fall Term, 1840, of Macon Superior Court of Law, before BAILEY, Judge. The declaration was for a trespass by the defendant on the personal property of the plaintiff. The facts were these: The plaintiff claimed under a sale by execution of the standing crop
(266) of corn, which had been raised by the defendant Bates on his own land. The sale was regular and the plaintiff was the purchaser. The sale was made on the 14th of September, 1837. It was proved that the defendant Bates pulled down the corn soon thereafter, and swore the plaintiff should never take it, that he would kill his driver and team, if he attempted to take it away; that shortly after that time, (the witness did not know whether Bates had finished pulling the corn, or whether he was in the field,) the plaintiff brought his wagon to haul the corn away. The defendant McKay, who also claimed the corn under an execution sale, rode up and said the plaintiff should not have the corn, and stepped before the team, and swore, if the plaintiff took the corn, he should take it over his dead body; but agreed that he might take a load of oats, and, on his agreeing to take the oats, suffered the plaintiff's wagon to pass into the field for that purpose. The defendants' counsel contended that this did not constitute a trespass on the personal property; that the defendant Bates had a right to pull down the corn, though the plaintiff had a right to the crop under his purchase at execution sale; and that the defendant McKay committed no trespass on the property, he merely preventing the plaintiff from hauling it by threatening him. His Honor charged the jury that if the plaintiff's purchase of the growing crop was fair, the property in the corn vested in him, and he had the right to gather it; that the defendant Bates had no more right to pull the corn than any other man, and that, if he did so, he was a trespasser; and that if they, from the evidence, believed that the other defendant McKay directed, aided or encouraged him to commit the trespass, he would also be guilty, and the plaintiff would be entitled to recover some damages.

The jury found a verdict for the plaintiff, and assessed five

cents damages. The defendants moved for a new trial on the grounds stated above, which was refused by the court, who rendered judgment for the plaintiff. From this judgment the defendants appealed to the Supreme Court.

No counsel for the plaintiff.
Francis for the defendants.

(267) GASTON, Judge. As the law authorises an execution to be levied upon a growing crop as a chattel, it must afford to the purchaser a remedy against all, who unlawfully disturb him in the enjoyment of it. What that remedy should be, seems to have occasioned some perplexity with the courts. In New York, it appears to be fully settled that the vendee of a growing crop acquires such an exclusive right to the possession of the land, whereon it grows, as to make that land *his close,* until the crop can be gathered and removed, and that therefore he may maintain trespass *quare clausum fregit* against any who enter thereon, without his leave. *Stewart* v. *Doughty,* 9 Johns., 108; *Austin* v. *Sawyer,* 9 Cowen, 39. And this doctrine is avowedly founded on the analogy, which is thought to prevail, between the interest which is transferred by such a sale, and that which passes under the grant of the vesture or of the herbage of the soil. Our researches and reflections have however brought us to a different conclusion.

"If a man hath twenty acres of land, and, by deed, grant to another and his heirs *vesturam terræ* and maketh livery of seisin *secundum formam chartæ,* the land itself shall not pass, because he hath a particular right in the land; for thereby he shall not have the houses, timber, trees, mines, and other real things parcel of the inheritance, but he shall have the vesture of the land, that is, the corn, grass, underwood, sweepage and the like; and he shall have an action of trespass *quare clausum fregit*"—Co. Lit., 4 b. "The same law, if a man grant *herbagium terræ* he hath a like particular right in the land, and shall have an action *quare clausum fregit;* but, by grant thereof, and livery made, the soil shall not pass as aforesaid. If a man let to B. the herbage of his woods, and after grant all his lands in the tenure, possession or occupation of B., the woods shall pass, for B. hath a particular possession and occupation, which is sufficient in this case"—Co. Lit. *ut supra.* These portions of Lord COKE are universally regarded as laying down accurately the law in relation to the interests, which pass under a grant of the vesture, or

of the herbage of land. A grant of this kind, there-
(268) fore, doth pass, not indeed the whole land, but a particular right *in the land itself*—and for that purpose also, "a particular possession and occupation" of the land itself. It passes to the grantee, the exclusive right to use and enjoyment of these profits as a parcel of the land; of consequence, the exclusive right to the profits themselves, and of consequence also, the exclusive possession thereof, as indispensable to the exercise of this right. *Burt* v. *Moore*, 5 Term., 330. Wherever there is such an exclusive right to the possession, trespass *quare clausum fregit* will lie, because for that purpose the land is the *close* of the possessor. *Wilson* v. *Mackreth*, 3 Bur., 1826; *Hoe* v. *Taylor*, Moore, 365. But the law makes a pointed distinction, between those profits which are the spontaneous products of the earth or its permanent fruits, and the corn and other growth of the earth which are produced annually by labor and industry, and thence are called *fructus industriales*. The latter for most purposes are regarded as personal chattels. Upon the death of the owner of the land before they are gathered, they go to his executor and not his heir. Upon the termination of an estate of uncertain duration by an act other than that of the lessee, they belong to him as personal chattels, and do not go over to the owner of the soil—they are liable to be seized and sold under execution *as* personal chattels—and a sale of them while growing, is not a contract or sale of land, or any interest in or concerning land under the statute of frauds, but a sale of *goods*. See Co. Litt., 55 a. b. and 56 a.; *Smith* v. *Tritt*, 1 Dev. & Bat., 241; *Evans* v. *Roberts*, 5 Barn. & Cress., 829; (12 E. C. L. R., 377;) *Sconell* v. *Baxall*, 1 Young & Jac., 398. The vendee of the sheriff, therefore, purchases them as personal chattels, not as a parcel of the land, and by the sale acquires no particular right in the land itself, whereon they are growing, nor any particular possession or occupation of the land. The law unquestionably annexeth to this transfer of the chattels whatever is necessary for the taking and enjoying thereof; and therefore in the language of Littleton, sect. 68, he who shall have the corn "shall have also free *entry*, *egress*, and *regress*, to cut and carry away the
corn." Lord Coke, commenting upon these words of
(269) Littleton, adds "and the law in this case driveth him not to an action for the corn, but giveth him a speedy remedy *to enter upon the land*, and to take and carry it away, and compelleth him not to take it at one time, or to carry it away before it be ready to be carried; and therefore the law giveth *all*

which is convenient, viz: free entry, egress, and regress as *much as is necessary.*" Co. Lit., 56 a. And he further remarks "If the lessee" (whose uncertain term has been put an end to, without his fault, and who endeavors to enter to gather his growing crop) "be disturbed of *this way*, which the law doth give unto him, he shall have his action *upon his case* and recover his damages; and this action the law doth give unto him, for, whenever the law giveth anything, it giveth also a remedy for the same." Co. Lit. *ut supra.* From this, the conclusion seems unavoidable that the purchaser of the growing crop does not become the tenant of the land, but acquires as incidental to that purchase a temporary easement in nature of a right of way over the land. The corn growing is his *property*, and, therefore, he may bring an action for that—but the law giveth him a *more speedy remedy*, not a further interest or property affecting the land itself. The law doth not make the land his close, but authorises him, although it be the close of another, to make entry thereon to obtain his property. And as it giveth him this right of way, it will give him compensation in damages in an action upon the case against any one, who disturbs him in the enjoyment of this right. This view is in accordance with that taken in a very learned and accurate work, Williams on Executors, vol. 1, page 460, where it is stated, "When there is a right to emblements, the law gives a free *entry*, *egress* and *regress*, as much as is necessary, in order to cut and carry them away; but the emblements do not give a title to exclusive occupation." It has been supposed that the case of *Crosby* v. *Wadsworth*, 6 East., 601, countenances the doctrine, that the purchaser of a growing crop of corn acquires an exclusive possession of the close, so that he may maintain trespass *quare clausum fregit.* It must be admitted that the distinction, which we believe to be the true one,
(270) between the transfer of a growing crop of corn, and of the growing herbage, was not pointedly taken in that case, but the case did not call for such a distinction. The contract there, was for a standing crop of mowing grass then growing on the vendor's land, and not of *fructus industriales*, and therefore was properly regarded as a contract respecting "an unsevered portion of the freehold, and not moveable goods, or personal chattels." Lord ELLENBOROUGH'S remarks, 6 East., 610. But in the case of *Evans* v. *Roberts*, the distinction is drawn and fully recognized, and thereby, as we think, much of the perplexity and confusion, which had been occasioned by not adverting to that distinction, removed from the subject. Our

opinion upon this point is, that the action is properly brought as for a trespass on the plaintiff's goods.

We see no error in that part of his Honor's instructions, which informed the jury, that if, from the evidence, they believed the defendant McKay directed, aided, or encouraged the other defendant in the commission of the trespass, *he* also was liable as a trespasser. The Judge did not put McKay's guilt upon the ground of a subsequent assent to the trespass of Bates, as the counsel for the defendants supposes, but upon the ground of previous or cotemporaneous direction, aid and encouragement. Whether the evidence proved such concurrence was a matter for the decision of the jury; for we think there was evidence tending to prove it, and fit for their consideration.

PER CURIAM. Let the judgment be affirmed.

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(271) RICHARD H. BONNER *vs.* ELKANAN W. LATHAM.

1. A grantor by a deed, dated in 1833, conveyed a certain slave to her son-in-law B. and his wife T. till her grand-daughters M. and S. attained the full age of twenty-one years or married; and if B. died before the expiration of that period, leaving his wife, then the right to vest in her until the age of twenty-one years or the marriage of M. and S.; if the said T. died before her husband, then the whole property to vest in the said M. and S. to be equally divided between them as tenants in common, and from and after the full age of twenty-one years or the marriage of the said M., then the one half of the said property to be equally divided and delivered to the said M., her heirs, &c., and after the full age of twenty-one years or marriage of S. the other half of said property to be divided and delivered to her, her heirs, &c.; and if either M. or. S. should die without leaving lawful issue, the property to go to the survivor; and if both die without leaving lawful issue, then to return to the grantor. *Held by the court*, that, as the limitations in the deed, by force of the act of Assembly, (Rev. Stat., c. 37, s. 22,) must be construed as an executory devise in a last will would be, the grand-daughter M., on her marriage, became a tenant in common with the son-in-law B., though the other grand-daughter S. was still under age and unmarried.
2. One tenant in common of a chattel cannot maintain detinue for such chattel against his co-tenant.
3. The cases of *Campbell* v. *Campbell*, 2 Mur., 65, and of *Lucas* v. *Wasson*, 2 Dev., 398, cited and approved.

This was an action of detinue, brought to recover a negro man named Toby, and tried at the Fall Term, 1840, of Beaufort Superior Court of Law, before his Honor Judge DICK. The facts of the case as agreed on by the parties, were as follows:

One Sarah Winburn, on the 15th of October, 1833, conveyed the negro Toby, among other slaves, to one Nathan Brown and his wife Temperance, and to Mary F. Wilkins and Sarah J.

Wilkins, for the purposes set forth in the said deed, a copy of which is hereto attached and made a part of this case. It was admitted that Nathan Brown sold and conveyed the said negro Toby to the plaintiff in this action. It was further admitted that the defendant intermarried with Mary F. Wilkins, before she arrived at twenty-one years of age; that, after the defendant's marriage as aforesaid, he got the negro Toby into
(272) his possession, and had him in his possession at the time this action was brought. It was further admitted that Sarah J. Wilkins was under twenty-one years of age and unmarried at the time this action was brought, and that she has since married; and that Nathan Brown and his wife, and Mary F. Latham and Sarah Jane are all now living. The plaintiff in this suit claimed the absolute property in the negro Toby under his purchase from Brown, as before stated.

The deed referred to from Sarah Winburn, is in these words:

"Know all men by these presents, that I, Sarah Winburn, of the county of Martin and State of North Carolina, for the natural love and affection which I have and do bear for and towards my daughter Temperance Brown and my two granddaughters (namely) Mary Frances Wilkins and Sarah Jane Wilkins, and for their better maintenance and preferment in life, and also for and in consideration of the sum of ten shillings to me in hand paid before the execution of these presents by said Mary Frances Wilkins and Sarah Jane Wilkins, the receipt whereof I do hereby acknowledge, have given, granted, bargained and sold, aliened and confirmed, and by these presents do give, grant, bargain, sell, alien and confirm unto Nathan Brown and his wife Temperance, until the full age of twenty-one years or the marriage of said Mary Frances Wilkins and Sarah Jane Wilkins, children of James Wilkins, dec'd, and my grand-children, whichever may first happen; but if the said Nathan Brown shall die before his said wife Temperance and during their being unmarried or under twenty-one years of age, that his right therein shall cease and the same shall be vested in the said Temperance until the full age of twenty-one years or the marriage of said Mary Frances Wilkins and Sarah Jane Wilkins; but if the said Temperance shall die before said Nathan, then the whole property and estate shall vest in the said Mary Frances Wilkins and Sarah Jane Wilkins, their heirs and assigns, to be equally divided between them as tenants in common; and from and after the full age of twenty-one years or the marriage of the said

Mary Frances Wilkins, then the one half of the said
(273) property and estate to be equally divided and delivered unto the said Mary Frances Wilkins, her heirs and assigns forever; and from and after the full age or marriage of said Sarah Jane Wilkins, then the other half of the said estate or property to be divided and delivered unto the said Sarah Jane Wilkins, her heirs and assigns forever, and if either of my said grand-children shall die without leaving lawful issue of her body living at the time of her death, then and in that case the part or share of her so dying shall go to be vested in the surviving grand-daughter, her heirs and assigns forever. In case the survivor of them shall die without leaving lawful issue of her body at the time of her death, then the whole of said property given her herein and accrued to her by survivorship, shall be vested in and go to me the grantor and to my heirs and assigns, the following property, both real and personal, to wit: a certain tract or parcel of land, lying and being in the county of Martin and State of North Carolina, described in a deed, &c. [Here the land is described.] Also the following negro slaves, to wit: [naming the slaves] to have and to hold the said land and slaves, with all the improvements and appurtenances to the said land belonging in manner before mentioned. And it is understood and agreed between the said grantor Sarah and the said Nathan Brown, that the said Nathan, during his term in said property, is bound to school and clothe the said Mary Frances Wilkins and Sarah Jane Wilkins, at his own expense to the value of the profits of said property, but subject to no account for the profits or use and occupation of the same during said time unto any one whatever, nor for his failure to so school and clothe them; but he shall be liable to account for the profits, use and occupation of the property after the respective age of twenty-one years or the marriage of said two grand-daughters or children of said grantor. In witness whereof, the said grantor hath hereunto set her hand and seal, this the 15th day of October, A. D. 1833.

SARAH WINBURN, [Seal.]

Witness,
MATTHEW SHAW."

The jury rendered a verdict for the plaintiff, and found the value of the negro Toby to be one thousand dollars, and
(274) assessed damages for the detention up to the time of trial to three hundred and fifty dollars, subject to the opinion of the court whether the plaintiff could maintain this action. The court, being of opinion that the plaintiff could not recover,

ordered the above verdict to be set aside and a nonsuit entered; from which judgment the plaintiff prayed for and obtained an appeal to the Supreme Court.

No counsel for the plaintiff.
Badger for the defendant.

DANIEL, Judge. If the limitations in a deed of slaves were contained in a last will, and would be good as an executory devise, they shall be good and effectual in the deed as a remainder. Rev. Stat., c. 37, s. 22. The plaintiff had but the interest of Brown in the slave under the deed of Sarah Winburn. To ascertain what that interest was, it may be necessary to divide the deed into five branches. *First*, the settlor, by the deed, gave the slave to her son-in-law Brown and his wife Temperance, until the full age or marriage of Mary and Sarah Wilkins, which may first happen. *Secondly:* But if Brown shall die before his wife and "during *their* being unmarried or under twenty-one years of age," then the right shall vest in the wife of Brown, until the full age of twenty-one years or the marriage of Mary and Sally Wilkins. *Thirdly:* But if the wife should die before her husband, then the whole property shall vest in the said Mary and Sarah Wilkins, their heirs and assigns, to be equally divided between them as tenants in common. *Fourthly:* "And from and after the full age of twenty-one years *or* the marriage of *Mary F. Wilkins*, then the one half of the said property and estate to be equally divided and delivered to her and her heirs forever." As to the other moiety, it is given to Sarah J. Wilkins in the same terms. *Fifthly:* Brown is made liable to account for the profits of the estate only "after the respective age of twenty-one years *or* the marriage" of the grand-daughters of the settlor.

The plaintiff contends that Brown was entitled to the exclusive interest in the slave until Mary and Sarah *both* married, or *both* should arrive to the age of twenty-one years, or one should marry and the other should arrive to the age of twenty-one years. Both of the girls had not married at the date of the writ. Sarah then was single and under age.

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From reading the whole deed, and particularly the fourth and fifth branches of it, the intention of the settlor seems to be apparent, that on the event of either of her grand-daughters marrying *or* arriving at age, one half of the property should immediately vest in such grand-daughter. The estate was not intended

to remain in Brown and wife until both the girls married. The grantor was making a provision for each of the girls, to take effect at such time as they or either of them might reasonably want it. We are of opinion that, at the date of the writ, the defendant was tenant in common of the slave with the plaintiff. One tenant in common cannot maintain detinue against his co-tenant to recover the possession of the chattel so held in common. *Campbell* v. *Campbell*, 2 Mur. Rep., 65; *Lucas* v. *Wasson*, 2 Dev. Rep., 398. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

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(276) Doe on demise of JOHN WALL *vs.* JOHN HINSON.

1. This court will presume the judgment of the court below to have been right, unless error be shewn; and it is the duty of the appellant to furnish the court with the means of ascertaining such error.
2. Surprise on the trial furnishes no ground for the interference of this court. That is a matter for the consideration of the court below on a motion for a new trial.
3. The refusal of a new trial cannot be assigned for error.
4. A lease of land for a term of years need not be registered.
5. The case of *Lindsay* v. *Lee*, 1 Dev., 464, cited and approved.

This action of Ejectment was tried at Fall Term, 1839, of Anson Superior Court, before his Honor Judge TOOMER, when a verdict was rendered for the plaintiff. A motion on the part of the defendant for a new trial was overruled, and judgment pronounced by the court for the plaintiff, from which the defendant appealed. The case is stated by the court in delivering their opinion.

Winston and Strange for the plaintiff.
Mendenhall for the defendant.

GASTON, Judge. The case made out for this court, which is to be regarded in the nature of the appellant's Bill of Exceptions, states that the defendant gave in evidence a deed of bargain and sale of the land in dispute, executed to him by Sarah Martin, who had a life estate therein, on the 26th of April, 1828, "a copy whereof is attached and made a part of the case," and also a deed containing a contract of lease, written on the same sheet of paper and bearing the same date, executed by him to the said Sarah, "a copy of which is also attached and made a part of the case." But no copy of either of the deeds is attached, nor is there any other description of either of them, or any statement of their contents. In the hope of obtaining a more

complete transcript, we issued a certiorari; but the return in no manner supplies these defects. As therefore we are to presume the judgment below right, until error is shewn, and as it is the duty of the appellant to furnish us with the means of ascertaining whether error does or does not exist, we feel our-
(277) selves bound to understand the deeds referred to, as warranting the operation and construction, which the court below gave to them, unless such operation and construction could not legally be attributed to deeds of that character.

The case, then, as it appears on the trial, was that Sarah Martin, the tenant for life, duly conveyed her estate to the defendant, who immediately thereafter leased the premises to the said Sarah; that the said Sarah's interest in the land was duly levied upon and sold under execution, and conveyed to the lessor of the plaintiff. There was a controversy between the parties, whether the conveyance to the defendant by Sarah Martin was not fraudulent and void against the plaintiff, claiming under one of her creditors; but the plaintiff insisted, however that might be, he was entitled to recover, because, if that conveyance was valid, the lessor of the plaintiff had acquired Sarah's interest under the lease from the defendant. And his Honor so instructed the jury. If the lease were a valid one, and the term thereby granted had not expired, clearly this instruction was just. We see nothing to shew that the term had expired. The case does not set forth that such an objection was raised. Nor do we see any objection raised to the validity of the lease on the trial. It was indeed contended, *on the motion for a new trial*, that the lease was invalid, because it did not appear to have been proved and registered, as is required by law for the conveyance of lands. The refusal of a new trial cannot be assigned for error. That motion was addressed to the sound discretion of the Judge, and it was for him to say whether he would listen to an objection, which had not been raised on the trial, and which was made to the validity of an instrument by the party, who had himself introduced it. Besides if the lease were for a term of years, registration is not necessary to its validity.

The alleged surprise on the plaintiff as to the legal effect of the lease is a matter of which *we* can take no notice, (*Lindsay* v. *Lee*, 1 Dev., 464,) and the question, respecting the admissibility in evidence of the report of the commissioners to the County Court of Anson upon the state of Sarah Martin's accounts,
(278) as the administratrix of her deceased husband, become wholly immaterial, unless the defendant can shew that

the Judge erred in instructing the jury to find for the plaintiff, although Sarah Martin's conveyance to the defendant were *bona fide*. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

AMBROSE MINGA *vs.* JULIUS H. ZOLLICOFFER.

An original attachment cannot issue in this State for any cause of action arising from *tort*, but only for those founded on contract.

This was a case brought from Halifax Superior Court of Law on an appeal by the defendant from the decision of his Honor Judge HALL, made at Fall Term, 1840. The plaintiff sued out an original attachment against the defendant and declared against him (in the usual form) for an assault and battery, alleged to have been committed by the defendant upon the person of the plaintiff. The defendant having appeared and replevied, moved to quash the writ or dismiss the suit, on the ground that the attachment was not a proper suit or process to be sued out on the cause of action set forth in the plaintiff's declaration. But the presiding Judge, being of opinion that the attachment was a proper process in this case, and was rightfully sued out, overruled the defendant's motion and ordered him to plead to the action, from which order he prayed, and his Honor allowed an appeal to the Supreme Court.

B. F. Moore and Whitaker for the plaintiff.
Badger and Daniel for the defendant.

GASTON, Judge. The provisions in our act of Assem-
(279) bly, in relation to the remedy by original attachment, purport to be directed against absconding or non-resident *debtors*. The case set forth in the 1st section, Rev. Stat., c. 6, is "that a person indebted" hath removed or is removing himself out of the county privately, or so conceals himself that the ordinary process of law cannot be served on "such debtor." That provided for in the second is, when a person, who shall be an inhabitant of any other government, so that he cannot be personally served with process, "shall be indebted" to any person or resident of this State. The cases referred to in the 13th are those, where by law a justice hath jurisdiction, and complaint is made on oath that any person hath removed or is removing himself out of the county privately, or so absconds or conceals himself that the ordinary process of law cannot be served "on such debtor," or that "such debtor" is an inhabitant of another gov-

ernment. It is true that where these sections prescribe the oath in regard to the existence and extent of the debt, they use the terms "debt or demand;" but it would seem clear that these are regarded as expressing claims of the same kind, for in the form of the attachment, given in the 4th section, it is recited that "A. B. (or A. B., agent, attorney or factor of C. D.) hath complained on oath that E. F. is *justly indebted* to him (or the said C. D.) the amount of &c.," and the mandate is to attach so much of the estate of the said E. F. as shall be of value sufficient "to satisfy the said debt and costs." Now neither in common parlance nor in legal proceedings is a mere wrong-doer designated as a debtor, nor his responsibility for the wrong classed under the denomination of debts. Debts are the creatures of contract, and the language of these acts must be exceedingly strained to bring within their operation claims arising not from contract but from *tort*.

We are all convinced that cases not of contract, were not intended to be embraced within these enactments. It is *manifest* that the debts or demands contemplated were supposed capable of being ascertained with such precision that the amount due thereon could be verified by the oath of "the plaintiff, his agent, attorney or factor." It would not be a little absurd to
(280) suppose that the plaintiff should be required to swear to the *amount due* him because of an assault, or of defamatory words, or of a malicious prosecution or any other personal injury, which is incapable of being weighed in pecuniary scales; but we can scarcely think with gravity of "his agent, attorney or factor" being received to state the account and swear to the true sum due thereon. Besides, if we must understand the term *debtor*, when describing the object of the attachment, sufficiently comprehensive to take in all persons, against whom civil suits may be instituted, how can we refuse to give the same meaning to the same term in the same statute, where the debtors of the defendant are directed to be summoned to answer for what may be due from them to the defendant? He, who has committed a wrong, is, in the eye of reason, just as well qualified as he who has received it, to declare on oath the just amount of compensation due therefor; and if those who have violated the plaintiff's rights are his debtors, so those who have violated the personal rights of the defendant are his debtors also. We believe, however, no one has yet thought that a garnishee was to answer for his *torts* against the defendant.

The present case does not require of us to say whether a judi-

cial attachment, founded upon a return of *non est inventus* to an original writ sued out against the defendant, will lie in a case not arising on contract—(see Rev. Stat., c. 31, s. 56, and c. 6, s. 12,) and therefore we forbear from expressing any opinion upon it.

It is to be certified to the court below that this court is of opinion that the attachment was not a proper process to be sued out by the plaintiff in this case, and that the writ ought to be quashed.

PER CURIAM. Judgment accordingly.

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(281) JOHN A. SMITHWICK *vs.* ELIZABETH BIGGS & al.

A testator, after bequeathing certain negroes to his wife for life, or during widowhood, bequeaths as follows: "I wish for the negroes lent to my wife, if they do not behave, to be hired out. I also wish for all the negroes not given to be hired out as soon as they will bring any thing. And after the death of my wife or marriage, I want all my property not given away to be equally divided among my girls." The negro for which this action was brought, was one of those directed to be hired out. *Held* that the daughters had only an interest in remainder after the death or marriage of the widow, and that therefore the plaintiff, who claimed under a conveyance from the husband of one of the daughters, could not bring trover for the negro during the lifetime of the widow, or while she remained unmarried.

This was an action of Trover for the conversion of a negro woman named Anesley, tried at the Fall Term, 1840, of Martin Superior Court, before his Honor Judge HALL. Upon a case agreed, the court decided that the plaintiff's action could not be sustained; whereupon he submitted to a nonsuit and appealed to the Supreme Court. The facts of the case are stated in the opinion of the court.

Badger for the plaintiff.

Biggs for the defendants.

DANIEL, Judge. This was an action of Trover to recover the value of a slave, named Anesley. Plea, not guilty. In the year 1824, Noah Perry made his will, and after several other devises and legacies, devised lands and three slaves (James, Hannah and Dempsey) to his wife Molly Perry for life or widowhood. Then comes this clause in the will: "I wish for the negroes lent to my wife, if they do not behave, to be hired out. I also wish for all the negroes not given to be hired out as soon as they will bring any thing. And after the death of my wife or marriage, I want all my property not given away to be equally divided among all

my girls." Anesley is one of the slaves directed to be hired out
The testator did not direct how the hires of the young
(282) negroes should be disposed of. The defendant is the
daughter of the testator, and was the wife of Joseph Biggs. In the year 1830, Joseph Biggs by deed conveyed to the plaintiff "his undivided part of the negroes willed to his wife by Noah Perry after the death of Molly Perry, the widow." Joseph Biggs died in the year 1832. In the year 1837, the widow, executor and daughters of Noah Perry, by a parol agreement, divided the said property, and the slave Anesley fell to the defendant. She took her into her possession and converted her to her own use, before the date of the plaintiff's writ. Molly Perry, the widow is yet alive. The court was of the opinion that the plaintiff could not recover. He was nonsuited and appealed.

That the testator did not contemplate a present and an immediate bequest to his daughters of the young negroes, is to be collected from these words in his will, to wit: "I also wish for all the negroes not given to be hired out as soon as they will bring any thing." And afterwards he proceeds and says "I want all my property *not* given away to be equally divided among my girls." We ask when? The testator answers "after the death or marriage of my wife." The remainder in the three negroes given to his wife for life composes a part of the property not given away. The daughters of course had but an interest in remainder in that portion of the property. And we think that the testator has made a bequest only *in futuro* to his daughters of the young negroes; for, as to them, the daughters can claim by no other words in the will than those just mentioned. It is quite unnecessary for us to decide whether the widow took a life estate by implication in the young negroes, or whether the executor was to receive the hires during the life of the widow for the next of kin. It seems to be clear that the daughters had no right to the possession of the young negroes (of whom Anesley is one) until the death or marriage of their mother. Joseph Biggs, by his deed in 1830, conveyed nothing more than this ulterior interest of his wife. In 1837 Anesley came to the defendant, not by force of the bequest in her father's will, but
by the parol assignment of the temporary interest, which
(283) was either in the widow or the testator or his executor.
The time has not arrived for the plaintiff to claim under his deed. The judgment must be affirmed.

PER CURIAM. Judgment of nonsuit affirmed.

ROWLAND MAYO *vs.* WILLIAM A. BLOUNT.

1. It is a sound rule in the construction of a deed that a perfect description, which fully ascertains the *corpus*, is not to be defeated by the addition of a farther and false description.
2. But the court has no right to strike out one part of the description more than another, unless the part retained completely fits the subject claimed, and the rejected part does not; and unless, further, it appears that the whole description, including the part sought to be rejected, *is applicable to no other thing*. It must be shewn, at least to the degree of moral probability, that there is no *corpus* that will answer the description in every particular.
3. The cases of *Proctor* v. *Pool*, 4 Dev., 370, and *Belk* v. *Love*, 1 Dev. & Bat., 65, cited and approved.

This was an action of Trespass *quare clausum fregit* tried at Fall Term, 1840, of Beaufort Superior Court of Law, before his Honor Judge DICK, when the plaintiff was nonsuited and appealed to the Supreme Court. The facts are stated in the opinion of the court.

J. H. Bryan for the plaintiff.
Badger for the defendant.

RUFFIN, Chief Justice. This is an action of trespass *quare clausum fregit*, and was tried on the general issue. The plaintiff claimed under a deed to himself from William S. Rowland, dated December 13th, 1828. In it the land is thus described: "A certain tract of land in the county of Beaufort, on the south side of Pamptico river, and west side of D. creek, and on or near the upper Cypress Swamp, a branch of South D. creek, it being part of a tract of land formerly belonging to the estate of John Rowland, deceased, which fell to me by heirship by the death of my mother."

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For the purpose of identifying the land conveyed, and shewing that the *locus in quo* was a part of it, the plaintiff gave in evidence a patent to John Rowland, issued in 1794, for a tract of land described thus: "Two hundred acres lying in our county of Beaufort, on the south side of Pamptico river, beginning at a sweet-gum in Douge's third line on or near the Cypress swamp, a branch of South Dividing creek; thence west 100 poles to a gum; thence south 320 poles to a holly; thence east 100 poles to a red bay; thence to the beginning." And also proved, that John Rowland died, leaving two children, William S. and Mary; to whom the granted land descended as the heirs at law of the patentee.

Upon that evidence the defendant insisted, that although the *locus in quo* was a part of the tract described in the patent, yet

that it did not appear that the deed to the plaintiff covered it. Of that opinion was the court; and the plaintiff submitted to a nonsuit and appealed.

It is possible the deed was intended to cover the granted land or an undivided moiety of it, and that the plaintiff might have shewn facts which would have authorised that construction. But, with his Honor, we think he did not do so on the trial The *onus* was on the plaintiff to prove such facts as would point the description to the land he claims under it. He insists, that he has done so, although he does not shew that the *locus in quo* descended to W. S. Rowland from his mother, or upon her death; because, as he says, the land is sufficiently described without that, and it may, therefore, be struck out. It is admitted to be a sound rule of construction, that a perfect description, which fully ascertains the *corpus*, is not to be defeated by the addition of a farther and false description. But we doubt whether there is in this case any such perfect description as will identify the subject of the deed with that of the patent. The deed (285) says, the land formerly belonged to John Rowland; but it does not refer to the patent as the means by which he acquired title, and the plaintiff gave no evidence that the patentee owned no other land that would answer to the other calls, namely, as lying on the south side of Pamptico and on the swamp. The deed gives no corners, courses, nor distances, nor quantity even; but only the streams, and the channels through which the bargainor derived his title. The reference merely to the water courses is too uncertain as a description, to identify this as the land, unless there be evidence to render it at least probable that John Rowland has no other land on those streams. But even in the reference to the streams, the two instruments do not agree. The grant says, that the beginning sweet-gum is "on or near the upper Cypress swamp, a branch of South Dividing creek," without designating on which side of that creek the land lies: whereas the deed, after mentioning that the land to be conveyed by it lies on the south side of Pamptico river, interpolates in the description the words "and on the west side of the D. creek." Evidence might have made it appear that the land mentioned in the patent is on the west side of Dividing creek; but no such evidence was given, and it may lie on the east side. The difference in the description shews, that the two tracts may be different; and their identity cannot be presumed, when there is such a discrepancy in the terms of description.

It is thus seen that the plaintiff was under the necessity of

resorting to the residue of the description in his deed, namely, that the land had belonged to the bargainor's father and fell to him by descent from his mother or at her death. Now, we have no right to strike out one part of this description more than another part, unless, as has been already said, the part retained completely fits the subject claimed, and the rejected part does not; and unless, further, it appear that the whole description, including the part sought to be rejected, is *applicable to no other thing*. For it may be that one part of the description will suit several distinct things; while the whole will embrace only a single thing. That single thing is the subject of the conveyance, if it can be found; and no other can be deemed the sub-
(286) ject, until it be shewn, at least to the degree of moral probability, that there is no *corpus* that will answer the description in every particular. *Proctor* v. *Pool*, 4 Dev., 370; *Belk* v. *Love*, 1 Dev. & Bat., 65. Now, it may be, that John Rowland owned other land, and made a will devising to his wife, who died intestate, and from whom it descended to the son and daughter; or that the father devised for life to the wife, without more, and that, upon her death, the land fell into possession of the children by descent from the father. It laid on the plaintiff to offer some evidence to rebut such probabilities: not that, in themselves, they are probabilities, but they are created, as applicable to this case, by the language of the deed, and, therefore, they ought, in some degree at least, to have been answered. In other words, we cannot strike out of the deed any part of the description which is not made to appear false; and while these words are retained in this deed, we must say, upon the evidence given, that this *locus in quo* does *not appear* to be embraced by it.

PER CURIAM. Judgment below affirmed.

YOUNG BRISENDINE *vs.* THOMAS MARTIN.

1. Where a surety brings an action of assumpsit, for money paid for the use and at the request of the defendant, against his co-surety, to obtain contribution, it is not sufficient for him to shew that he has given his note for the debt due by the principal, and that the same has been accepted by the creditor as a payment and discharge of the debt.
2. To entitle him to recover in this action, he must prove an actual payment in money, or in money's worth, such as bank notes, the note of a third person, or a horse or the like, which is valuable in itself to the surety who parts with it.

BRISENDINE *v.* MARTIN.

This was an action of Assumpsit, brought by the
(287) plaintiff to recover contribution of the defendant as his co-surety. The case was tried at Fall Term, 1840, of Rutherford Superior Court of Law, before his Honor Judge BAILEY. Several points were raised on the trial, by the defendant's counsel, which it is unnecessary to state, as only one was decided by this court, that being fatal to the plaintiff's action. Under the charge of the Judge below, the jury found a verdict for the plaintiff—a new trial was moved for and refused, and from the judgment the defendant appealed to the Supreme Court.

Saunders and Hoke for the plaintiff.
Bynum for the defendant.

RUFFIN, Chief Justice. The plaintiff, the defendant and David Nowland were the joint sureties of John C. Elliot, as the administrator of James Hoard, deceased. Elliot died insolvent and indebted to the estate; and administration *de bonis non* was granted to the present plaintiff. The next of kin of Hoard filed their bill in the Court of Equity, and obtained a decree against the present plaintiff and Nowland for the balance due from Elliot; and issued an execution, which was returned "satisfied." The mode in which it was satisfied was this: The present plaintiff gave to the creditor his note, with a surety, for one half of the sum; and the creditor accepted the same in satisfaction; and Nowland settled the other half. This action of assumpsit, for money paid to the use of the defendant and at his request, was then brought to obtain contribution from him.

On the trial, the counsel for the defendant objected, amongst other things, that this action would not lie, as the plaintiff had only given his note for the money. But the court held that to be such a payment as would enable the plaintiff to maintain the action.

There has been a tendency towards relaxing the strict rule, which requires the party to pay money, before he can bring an action for money paid. It is, indeed, established, that money's worth, as bank notes, a horse parted from at an agreed price, or the like, are to be looked upon as money, for the pur-
(288) poses of an action of this kind. In New York, it has, moreover, been held, that if a surety give a note and the creditor accept it in satisfaction, and give a discharge of the original debt, it is sufficient to give the surety his action against the principal. *Witherly* v. *Mann*, 11 John. Rep., 518. That case has been followed by so many others, that the doctrine may

be considered as settled in that State. In some cases, doubtless, it may promote convenience and perhaps justice. When this case was first opened to us, we were favorably inclined towards it, upon the ground that the plaintiff was conclusively bound for the money, and that the defendant was discharged from his former liability, and so had all the benefit of a payment. It struck us, therefore, that he ought not to say, the plaintiff had not paid the money. But we believe, upon consideration, that, having regard to the distinctive principles of actions, we are obliged to hold, that the plaintiff has not entitled himself to this action as yet. In the instances of bank notes, property, or even passing a bill or note made by a third person and belonging to the surety, the party parts from a thing that is valuable in itself. But when he gives his own bond or note, he is, in fact, nothing out of pocket until he pays it. He has merely given a new security for the debt, and may never pay it. The discharge of the principal from the original demand is not sufficient to support the action; for that applies equally to a voluntary release given by the creditor at the instance of the surety, and in that case the action certainly would not lie. Now, there are many ways in which it may happen that the present plaintiff may escape from paying this debt. He may not be called on for it by the creditor; or he may become insolvent; or his note may be void, as founded on or connected with an usurious contract, for example: so that it is quite possible he may evade the payment. While that is so, however the parties may have treated the note in giving and receiving it, the law cannot deem it equivalent to money. The plaintiff is, as yet, none the poorer by the defendant, and until he shall be, we think the action for money paid cannot lie. It is against elementary principles that it should. If, indeed, there had been with us a series of adjudged cases, as in New York, or even one judgment
(289) of this Court, we should, probably, have been willing, if not felt ourselves bound, to follow the precedent. But we do not know of any such case, and we do not feel authorised, against principle, to make the precedent. At one time it was held by Lord KENYON, at *Nisi Prius*, and, it would seem, also by the Court of King's Bench, that a promissory note of the party's own, if taken in payment, might be considered as money. *Barclay* v. *Gooch*, 2 Esp. N. P. Rep., 571. But that case has not been followed; and whenever it has been since mentioned, it has been disapproved. It was questioned and disregarded in *Taylor* v. *Higgins*, 3 East., 169. In *Maxwell* v.

Jameson, 2 Barn. and Alder., 51, the surety took up the note of his principal by giving his own bond to the creditor; but he was not allowed to recover for money paid. In that case, the Court considered *Barclay* v. *Gooch* and *Taylor* v. *Higgins* inconsistent with each other, and therefore followed the last, especially as it was consistent with principle. For these reasons, we think the judgment erroneous, and it must be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment accordingly.

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(290) ERASMUS D. WOLFE *vs.* SAMUEL FLEMING.

1. Probably if there be an explicit acknowledgment of a debt, and a distinct admission that it has not been paid but still exists, and nothing more be said about the mode or time of payment as proposed by the debtor, or of his objection to pay upon the ground of the statute of limitations, or some other defence, then such unqualified admissions might go to the jury as evidence of a new promise. But if the language of the party be so vague and indeterminate, as not in itself to amount to a promise, or to satisfy the mind, either from its own terms or something referred to, what the party meant to engage, there is nothing to repel the statute of limitations.
2. To repel the bar created by this statute, the words ought not to leave the meaning in doubt, but should clearly indicate the intention to assume or to renew the obligation for the debt.
3. Where it was proposed to the defendant that if he would pay the principal, the interest should be forgiven, and he declined the proposition, and in turn, requested the witness to buy the debt (which was about $655 principal, and about $180 interest) for $500, and expressed the opinion that the creditor would accept that sum, *held* that these words did not take the case out of the statute of limitations. This language imports more an offer to compromise, than a promise to pay the debt.

This was an action of Assumpsit for goods sold and delivered, tried at Fall Term, 1839, of Burke Superior Court of Law, before his Honor Judge PEARSON. The pleas were the general issue and statute of limitations. The plaintiff proved the delivery of the goods, and that the price agreed on was $\$655\frac{10}{100}$ to be paid in April, 1832. The writ was issued 24th April, 1837. The plaintiff read three letters of the defendant, apologizing for not having paid sooner, and professing a perfect willingness to pay, &c. The last letter was dated in October, 1833, asking indulgence until December, and promising to pay at that time. The plaintiff then called Mr. McKesson, who swore that, sometime in the year 1836, at the request of the plaintiff, he called upon the defendant and stated to him "that

he was authorized by the plaintiff to propose to him
(291) that, if he would pay the principal, the interest would be forgiven." The defendant replied, "I wish you would buy the debt for me for $500: I think by your stating that it is a hard case he will agree to take that sum." The witness promised to inform the plaintiff of the defendant's proposition, and the conversation ended. The plaintiff here closed his case and the defendant offered no evidence.

The court instructed the jury that if they believed the evidence, they would find the *general issue* in favor of the plaintiff, but that they must find the plea of the statute of limitations in favor of the defendant; for to take a case out of the statute of limitations, there must be a promise to pay, either express or implied; that in this case there was no evidence of an express promise, and the evidence, if true, did not establish a state of facts, from which the law would imply a promise. There was a verdict for the defendant, and the plaintiff's counsel obtained a rule for a new trial, on the ground of misdirection by the court. This rule upon argument was overruled, and judgment rendered for the defendant, from which judgment the plaintiff appealed to the Supreme Court.

No counsel for the plaintiff.
Saunders for the defendant.

RUFFIN, Chief Justice. Although the facts stated in the record are not precisely the same, nor as strong as they were when the case was formerly before us, 4 Dev. & Bat. 129, yet we concur with his Honor in thinking, that enough does not appear to take the case out of the statute of limitations, according to the former decisions.

The whole question turns on the testimony of the witness (McKesson,) who testified for the plaintiff on both trials. Not the least remarkable circumstance in the case is the difference in the statements of that person's testimony upon the two trials. On the first he is made to say, that the defendant *refused to pay the debt;* and moreover, that, after offering to pay $500, the
defendant declared, that, if the plaintiff would not take
(292) that sum, he would pay no more, and *would plead the statute of limitations.* We thought clearly, that such refusal to make payment and express reliance on the statute, repelled all idea of a promise to pay. The witness now omits all he then said on the subject of the defendant's express refusal to pay, and of his pleading the statute. Perhaps few circum-

stances could more strikingly exemplify and illustrate the correctness of the rules adopted by us, than these discrepancies. They show the propriety of requiring something more than language, which, by straining, may be made to mean an acknowledgment of the debt; something explicit and unequivocal, that might not have been intended in one sense by the speaker, and understood or misunderstood in another sense by the witness. Hence we have thought it proper at different times to say "that no acknowledgment is sufficient, unless it furnish a plain inference, that the defendant thereby intended to engage to pay the debt:" "that it ought to be such an acknowledgment as would be evidence to sustain an action on it as a special promise:" "that besides acknowledging the debt to have been contracted, and that it is not paid, there ought to be something to indicate an existing willingness or intention to pay or remain bound:" expressions varying, indeed, in the terms used, but of the same import and meaning. Probably, if there be an explicit acknowledgment of a debt, and a distinct admission that it has not been paid but still exists, and nothing more be said about the mode or time of payment as proposed by the debtor, or of his objection to pay upon the ground of the statute or some other defence, then such unqualified admissions might go to the jury as evidence of a new promise. But if the language of the party be so vague and indeterminate as not, in itself, to amount to a promise, or to satisfy the mind, either from its own terms or something referred to, what the party meant to engage, we think there is nothing to repel the statute. In the case, as now appearing, it is not pretended that there is an express promise to pay. Neither do we think there is a fair, much less a plain inference or implication of a promise. The witness proposed to the defendant, that, if he would pay the principal, the interest
(293) should be forgiven. That was not accepted by the defendant; but he, in turn, requests the witness to buy the debt for $500, and expresses the opinion, the creditor will take that sum. It cannot be reasonably assumed, after the defendant had declined availing himself of the first proposition, so favorable to him, that immediately he should intend by his own proposition to acknowledge and assume the whole debt, principal and interest, or indeed any part of it, except upon the footing of his new and conditional offer, which has not been accepted on the other side. The language of the defendant purports to be in the nature of a proposition of compromise, and of his desire that the witness should befriend him in buying his

peace, rather than an acknowledgment of his legal obligation and willingness to pay the debt in question. But to repel the bar of the statute the words ought not to leave the meaning in doubt, but should plainly indicate the intention to assume or renew the obligation for the debt.

PER CURIAM. Judgment below affirmed.

Den ex dem. DAVID G. FLANNIKEN *vs.* DAVID LEE.

1. In this action of ejectment, the only question was as to whether the defendant was in possession of the premises at the time of the institution of the suit. It appeared that several years before the suit commenced the defendant had possessed a building, which was *intersected* by the line between him and the lessor of the plaintiff. The building had two rooms, one of which was a corn-crib, which was on the land of the lessor of the plaintiff, and which, having an outer door, was kept locked by the defendant, who was requested, but refused, to remove the building to his own side of the line. *Held* that under these circumstances, if the defendant, at the time the action was brought, kept the crib locked up, *this* was such a possession by him as warranted the plaintiff's action.
2. It is the duty of the appellant to the Supreme Court to see the cases so made out as distinctly to present the points upon which the judgment below is sought to be reviewed.

(294) This was an action of Ejectment, tried at Spring Term, 1839, before NASH, Judge, when there was a verdict for the plaintiff under the charge of the Court, a new trial moved for and refused, judgment for the plaintiff and an appeal to the Supreme Court. The facts so far as they regard the point submitted to this Court, are stated in the opinion delivered.

Hoke and Saunders for the plaintiff.
Alexander and Barringer for the defendant.

GASTON, Judge. This was an action of Ejectment. There was a verdict for the plaintiff, and a judgment accordingly, and the defendant appealed to this court. Upon the trial of the cause, it was much controverted whether the dividing line between the lessor of the plaintiff and the defendant ran north sixty-four degrees east, or north sixty-one east. If the former were the true course, it was admitted that the plaintiff was entitled to a verdict. But if the latter were the true course, then the right of the plaintiff depended upon the fact whether the defendant, at the institution of the action, was in possession on the plaintiff's side of the line. No objection has been taken to the correctness

of the instructions given to the jury in relation to the first question, but it is insisted that the instructions upon the second were erroneous.

From the case stated, we collect the circumstances, bearing upon the question of possession, to be these: Several years before the institution of the suit, the defendant had possessed, as a part of his homestead, a certain building which is *intersected* by the line No. 61 east. It was a building with two apartments, one of which he had used as a cotton house, and the other as a corn-crib. There was a partition between the two rooms, and each had an external door. While the defendant was thus in possession, a Mr. Chambers purchased the land of the lessor of the plaintiff, but did not perfect his legal title thereto. The apartment called the corn-crib then actually contained the defendant's corn, and was kept locked by him, but the other apartment was empty and the door unfastened. The defendant asked
(295) and obtained permission from Chambers to continue the possession of the crib, until the corn then in it should be all used. This was accordingly done, and afterwards Chambers required of the defendant to remove the building unto the defendant's side of the line. The defendant refused to do so, and some time afterwards the action was brought. The Judge's instruction to the jury was, that if the crib was on the plaintiff's side of the line, and the defendant, when the action was brought, kept the same locked up, *this* was such a possession by him, as warranted the plaintiff's action. In this instruction we do not see any error. The requisition on the defendant to remove the building unto *his* side of the line, was at once a manifestation that Chambers, then representing the lessor of the plaintiff, regarded it as the defendant's building, and also a notification that possession by him over the line was no longer to be allowed. If the defendant had refused upon the ground that he disclaimed ownership of the building or of that part of the building not within his own limits, the case we presume would have so stated. But a general refusal, accompanied by the subsequent exercise of dominion, can be reasonably regarded in no other light than as claiming the building, and claiming that it should remain where it stood. One of the usual modes of manifesting occupation of a house, is by the keeping of its keys; and occupation under a claim of right is possession.

We admit that the case is not so distinctly stated, that we can be quite sure that we do not misunderstand some of its circumstances. In one part of it the entire building is called a crib,

and in other parts the designation is confined to the room wherein corn was kept, and thereby some ambiguity is necessarily created. If by reason of this ambiguity, we have been led into any misapprehension, it is the misfortune or fault of the appellant, whose duty it is to see the case so made out as distinctly to present the points upon which the judgment below is sought to be reviewed. Until we see error in the judgment we presume it right.

The judgment of the Superior Court is affirmed with costs.

PER CURIAM. Judgment accordingly.

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(296) WILLIAM RICHARDSON AND THE EXECUTORS OF JOHN WALL *vs.* EDMUND JONES & al.

1. Where a bond is given to "A. and B. and other obligees," to be paid to the said "A. and B." an action for the breach of this bond cannot be brought in the name of A. and B. alone, without joining the others or shewing that A. and B. are the surviving obligees.
2. A payment to A. and B. would discharge the obligation; but if payment is not made, the suit must be brought in the name of the parties, with whom the obligation was contracted.
3. In actions *ex contractu* the omission to make the proper plaintiffs may be taken advantage of on the general issue.

This was an action of debt, tried at Spring Term, 1840, of Rutherford Superior Court of Law, before BAILEY, Judge, in which the plaintiff, submitting to the opinion of the Court, was nonsuited, and appealed to the Supreme Court. The facts are stated by the Judge who delivered the opinion of the Court.

Saunders for the plaintiff.
Bynum for the defendant.

DANIEL, Judge. This was an action for debt on a specialty: plea, *non est factum*. The plaintiffs declared on a bond dated, on the 16th April, 1823, for the sum of £3,500, made and executed to William Richardson and John Wall, as obligees. On the trial, the plaintiffs, to support their declaration, offered in evidence a bond for the same sum and date, but executed by the defendants to the said William Richardson and John Wall, Esqrs: "and the rest of the justices assigned to keep the peace for Rutherford county," "to be *paid* to the said William Richardson and John Wall." The reading of this bond in evidence was objected to, as it appeared to be a bond given to more joint obligees, than the one declared on professed to be. The court rejected the evidence; and the plaintiffs were nonsuited and appealed.

If the obligors, on a breach of the bond, had paid to
(297) Richardson and Wall, it would have been a good satisfaction and discharge. But if the obligors failed to pay as it is alleged they did, then the instrument offered in evidence informs us that the obligors have contracted, under their seal, with several other obligees besides Richardson and Wall. Those other obligees are not made parties plaintiffs in the declaration; nor is there any averment in the declaration that they are dead, so as to enable Richardson and Wall to sue as survivors. In actions *ex contractu*, the omission to join as plaintiffs in the writ and declaration of all those that ought to be joined, (viz. all the obligees who are alive,) may be taken advantage of on the trial under the general issue. The contract and obligation were made to others besides Richardson and Wall. The words in the contract "to be paid to the said Richardson and Wall," do not restrict the legal force of the deed to those two only; but as the contract is made jointly with all the named obligees, all must join as plaintiffs in the action. The plaintiffs could have averred in their declaration, who were justices at the date of the bond and have made them parties plaintiffs. And they could, and ought to have averred the death of any of the obligees, if any had died since the date of the bond, to enable the survivors to sue and maintain the action. The bond offered in evidence, was a different one from that described in the declaration, and it was properly rejected by the Court. The judgment must be affirmed.

PER CURIAM. Judgment below affirmed.

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(298) SAMUEL MITCHELL AND IRVIN DONNELL, Executors of PATRICK McGIBONEY, *vs.* PETER ADAMS.

1. The Court of Probate may accept the renunciation of an executor at any time before he has intermeddled with the effects of his testator, even after he has proved the will. So of the executor of an executor as to the first will.

2. Where A. died leaving a will, appointing B. his executor, and B., after proving the will, died leaving C. and D. his executors, who accepted the trusts of the latter will, and qualified as executors thereof, but without at the time renouncing as to the first will, but they never intermeddled with the effects of the first testator: *held* that the Court of Probate had the power, years afterwards, to accept their renunciation as to the first will, and grant administration *cum testamento annexo*.

3. *Held further*, that these acts, being within the power and jurisdiction of the Court of Probate, could not be incidentally or collaterally impeached in any other Court, but could only be attacked upon an application to the Court of Probate to revoke the letters of administration and recall the executors.

4. After probate, an executor cannot renounce at his own pleasure, but can only do so by leave of the court.

This was an action on the case, tried before his Honor Judge NASH, at the Fall Term, 1840, of Guilford Superior Court. The plaintiffs declared as executors of Patrick McGiboney, to recover a sum of money received by the defendant to the use of the plaintiffs as executors. The defendant, among other things, pleaded specially "that the plaintiffs have renounced as executors of Patrick M'Giboney, and that administration on his estate has been granted to one David McGiboney, to whom the defendant has tendered the money, but he has refused to receive it." To the several pleas there was a general replication, and on the trial the plaintiffs, in submission to the opinion of the Court, suffered a nonsuit, and appealed to this Court. The following is a statement of the case:

Patrick McGiboney died, leaving a last will and testament, which was duly admitted to probate, and John Cunningham, the executor, duly qualified as such. John Cunningham died, leaving a last will and testament, and the plaintiffs, the
(299) executors therein named, proved the same and were duly qualified, and duly administered the effects of this testator. At the time the plaintiffs so qualified as the executors of John Cunningham, it was not known to them or any other person that there was any estate of Patrick McGiboney remaining unadministered by his executor, John Cunningham. Some years afterwards, it was discovered that there was property to be administered. Whereupon the plaintiffs, without ever intermeddling with said property, went into Court and renounced their right to execute the will of Patrick McGiboney, and the Court, with their knowledge and consent, appointed David McGiboney administrator *de bonis non* with the will annexed of the said Patrick. The testator, Patrick McGiboney, had been a soldier of the revolution, and, under the acts of Congress, became entitled to a considerable sum of money; and to collect it, the administrator appointed the defendant his agent, who had accordingly done so; and this action was brought to recover it from him, it being at the time the action was brought still in his hands. A recovery was claimed for the plaintiffs upon the ground that they were the legal representatives of Patrick McGiboney, their renunciation being of no effect and the letters of administration granted to David McGiboney consequently void. The Court ruled that an executor of an executor may qualify and take upon himself the executorship of the latter will

and refuse to execute the will of the first testator, and that the County Court of Guilford had jurisdiction to accept the renunciation of the plaintiffs, and to appoint an administrator *de bonis non* with the will annexed, upon the estate of Patrick McGiboney; and that, as they had so done, and such administration was still in existence, not revoked nor reversed, the plaintiffs could not recover in this action.

J. T. Morehead for the plaintiff.
Graham and Bryan for the defendants.

RUFFIN, Chief Justice. It is quite certain that an executor cannot refuse the office in part and undertake it in part; but if he enter on the duties, he is compellable to go through (300) with them. But this is only true in respect of all the burdens imposed on him by the same will. For, if he be the executor of one who was the executor of a prior testator, he may take upon himself the administering of the will of his immediate testator, and refuse the other. *Hayton and Wolfe*, Cro. Jac., 614; Shep. Touch., 464. The executorship of both wills is not therefore one and the same office, but each is a distinct one; and the Court of Probate may allow the trusts in respect of the two estates to be divided, at least, when that is done in the first instance or at the time the executor takes probate of the will of his immediate testator. The question in this case is, whether it is competent for that Court to allow such renunciation, so as to found thereon a grant of administration *cum testamento annexo*, after the executor has once taken probate of the latter will, without accompanying that with a refusal of the former.

We do not see why the Court of Probate should not have such a power, especially before the executor has intermeddled with the effects of the first testator. At the time he took probate of his testator's will, he might not have known that he had been the executor of the former testator; and the purposes of justice or convenience to those interested in the first estate, as well as the last, may be promoted by separating the administration. Certainly, we think that after the executor has taken probate, he cannot, of his own mere pleasure, refuse the office under the first will, as he might have done before probate; but he can only renounce, if at all, by the leave and in the discretion of the Court. Our enquiry is, whether the Court has a jurisdiction to receive such subsequent renunciation and dismiss the executor. If there be no such power in the court, the grant of administra-

tion must be void; for there is no authority to appoint an administrator where there is an executor.

Since the two offices are distinct, it follows that the court must have the power to receive the renunciation of that one of them which is incidental as it were to the other, if, under the same state of facts, the renunciation by the executor of the office under the will of his immediate testator be admissible. It may, (301) therefore, be useful to ascertain whether the present plaintiffs, after taking probate of the will of *Cunningham*, could, before intermeddling with his assets, be admitted to renounce, and thereupon be dismissed.

It must be admitted to have been at one time held as law, that if an executor intermeddled with the effects, or did any act indicative of the intention of taking on himself the benefits and burdens of the will, the ordinary had no power to dismiss him and grant administration with the will annexed; and that advantage might be taken thereof in an action by the administrator, by plea, that the will appointed an executor, and that he had administered. *Graysbrook* v. *Fox*, 1 Plowd., 280; *Parten* and *Baseden's* case, 1 Mod. Rep., 213. Nothing could be more unreasonable than such a doctrine. It imports that the grant of administration is not merely voidable, but void; and, consequently, it would not even protect a debtor in paying to such an administrator. It might be impossible for the debtor or the ordinary to ascertain that the executor had intermeddled before refusing; and therefore the letters of administration ought not to be impeached, although it should afterwards come to light that he had thus intermeddled. Hence in such a case it was early held, that, though upon such a discovery the administration was revocable by the ordinary, yet it was valid until revoked. Went. Off. Ex., 91. The principle of the rule must be, that the fact of the executor's renunciation was within the knowledge of the ordinary, and *its legality and efficacy a matter for the ordinary's determination;* and, therefore, that while his decision stands, it must be respected and received as conclusive. In *Doyle* v. *Blake*, 2 Sch. & Lef., 229, Lord REDESDALE expressed his opinion, that the old cases could not be supported on principle; and said, that the purport of the modern decisions was, that an administration after the executor had acted *in pais* might be repealed, but was not a mere nullity, except as a protection to the executor against creditors. The executor cannot by such an administration, founded on his own renunciation, discharge himself from liability to creditors, arising out of his acts in administering;

yet a debtor cannot set up the act *in pais* of the executor to defeat the action. If the debtor be not allowed to
(302) impeach the administration by pleading that matter, as a consequence it must be the law, that a payment to such an administrator is a good discharge to the debtor—at all events, it will be so deemed during the existence of the administration. It is true, the grant of administration when there is a will, though unknown, or before the renunciation of the executor, is void. *Abram* v. *Cunningham*, 2 Lev., 182; 1 Ventr., 393; *Graysbrook* v. *Fox*, Plow., 276.

Hard as that rule may operate on debtors or purchasers from the administration, it yet cannot be denied, because it arises out of the jurisdiction to grant administration on the estate of one dying intestate. Consequently to authorise an administration, there must be an intestacy; which is, when there is no will, or a will without an executor. But there is a jurisdiction in the ordinary to judge of the validity of testaments, and also to dismiss an executor upon his renunciation; and, therefore, what is done by the ordinary upon a question of either of those kinds, must, while that tribunal permits it to continue in force, be conclusive on all other tribunals and persons. Hence when a person obtained probate, as executor of a forged will, a debtor was protected in making payment to him, because, if sued, the debtor could not have contested the will nor the propriety of granting probate to the executor. *Noel* v. *Wells*, 1 Lev., 235; *Allen* v. *Dundas*, 3 T. R., 125.

The same principle embraces the case before us. Whatever regulations the courts of probate may adopt for their own government for receiving the renunciation of the executor and dismissing him, or for revoking an administration thereon founded, and recalling the executor, they must be exclusively for the consideration of those courts, and of such others as may have the jurisdiction of reversal or appeal, or other direct control over the decision. As it is unquestionably within the province of the court of probate to receive an executor's refusal and dismiss him, and found thereon a grant of administration *cum testamento annexo*, such a grant cannot be incidentally and collaterally impeached in another court, upon the ground that the
(303) executor ought not to have been dismissed. Why should that be enquired into in another court? How can it be? If the executor ought not to have been dismissed, let the application be made to the court of probate to recall him. But, as the fact of the renunciation must be known to the ordinary, and

he is also to judge when an executor may be dismissed, in other courts the renunciation of the executor, recited in the letters of administration, must be presumed to have been really made and received, and also to have been made in apt time and effectually: although the court of probate may, upon its own principles, have the power or be under the obligation to compel him to assume the office again. *Factum valet, quod fieri non debuit,* as has been said. Supposing, therefore, that this administration might and ought to be called in, yet until that be done, the present plaintiffs cannot, in the face of their renunciation of record, state themselves to be executors to the prejudice of those who have acted on the faith of that renunciation.

It would seem, however, that the administration ought not to be revoked, according to the modern established course of the English Ecclesiastical Courts. An executor is now allowed to renounce at any time before he has actually administered goods of the testator. *In Jackson & Wellington* v. *Whitehead,* 3 Phil., 577, the executor, contrary to an old case in 1 Vent., 335, was permitted to renounce, after taking the oath of office; he not having intermeddled with the effects, and the probate not having passed the seals. SIR JOHN NICHOLL said that he had looked through a great number of cases, and found none where the court refused to dismiss, except on the ground *that the party had intermeddled with the effects.* That, indeed is assuming the whole responsibility of executor, and the court ought not to embarrass creditors and others by dividing the responsibility. So, when an executor renounced, and an administrator was appointed and sworn, the executor was allowed to retract and take probate at any time before the grant passed the seals, or other letters were actually issued, *McDonell* v. *Prendergast,* 3 Hagg., 212, and in that case it is especially said, that swearing is not intermeddling. But a still stronger case is that of *Meek &*

(304) *Donald* v. *Curtis,* 1 Hagg., 127. Here probate of a will was actually taken by two executors and an executrix, who was a married woman living apart from her husband; and the action of the executors being embarrassed by the necessity of the husband's joining in some transfers of stock, and the *feme* not having intermeddled with the deceased's effects, and no suit having been commenced by or against the executors in respect to the estate, the court, on the application of the parties, revoked the probate before granted, and decreed a new probate to the two executors by themselves, with a power reserved to the executrix.

Thus it is seen, that not only has the court of probate power to dismiss the executor and grant administration in the case of an intermeddling *in pais* by the executor, but it is also competent to do so where there has been nothing but the formal assumption of the office in the court of probate, without any intermeddling with the effects. It is not for us now to say, how far the purposes of justice or convenience to the parties made it discreet or proper in this case to admit the present plaintiffs to renounce or might require the court of probate to revoke what was then done; as the question before us concerns the jurisdiction or power only of the court. Upon that point our opinion is, that, upon authority and also from a due regard to the security of those who are obliged to deal with the administrator, the subject was within the jurisdiction of the County Court, and consequently, that the administration is not void.

PER CURIAM. Judgment below affirmed.

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(305) SAMUEL FLEMING *vs.* JACOB L. STRALEY.

Where the question was one of domicile at the date of the writ, and the defendant proved that the plaintiff, before the date of the writ, had gone from one county to another, and wished the jury to infer from this an abandonment of his former home, the testimony of a witness who swears that "this was not regarded in his (the plaintiff's) father-in-law's family, where the plaintiff resided, and where the witness, a member of the family, also resided, as an abandonment of the plaintiff's then place of residence," is admissible; for it does not appear that the witness came to his knowledge by the *ex parte* hearsay of any of the members of the family, but he may have derived it from other facts, apparent at the time to the family.

This was an action of debt, tried at the Spring Term, 1840, of Burke Superior Court, before his Honor Judge HALL, the writ having been issued from and returnable to the Superior Court of Burke county, directed to the sheriff of Yancy county, and executed by him. The defendant resided in Yancy county. At the return term, the defendant pleaded that, at the time of issuing the writ, the plaintiff was a resident of Yancy, and not of Burke county; to which there was a replication. Upon the trial of this issue, it was proved that the plaintiff formerly resided at his father-in-law's, in the county of Burke. At the trial the plaintiff was a resident of Yancy. A good deal of testimony was offered by both parties, in relation to the period when the plaintiff established his domicile in Yancy. It appeared in evidence that, about the time the writ issued, the plaintiff, with his wife and one of his children, went from his father-in-law's,

in the county of Burke, leaving one of his children behind him, to Burnsville, in Yancy, where he and the family he took with him remained about two weeks, living, during that time, in a house which the plaintiff there owned: that after the expiration of that time, he returned with his family to his former abode, in Burke, where he remained about two or three weeks, when he again went to Burnsville, where he has since continued to reside.

(306) A brother of the plaintiff's wife was examined as a witness by the plaintiff. He stated that, when the plaintiff, with his wife and child, left his father-in-law's, about the time of issuing the writ as before stated, he accompanied them. He further stated that the plaintiff's departure, on this occasion, from his father-in-law's, was not regarded, in his father-in-law's family, as an abandonment of the plaintiff's then place of residence, but merely as a temporary visit to Burnsville. This last testimony of the witness was objected to by the defendant's counsel, but admitted by the court. The jury returned a verdict for the plaintiff; a motion was made by the defendant for a new trial, because improper testimony had been admitted; but the motion was overruled by the court, and judgment rendered for the plaintiff. From this judgment the defendant appealed to the Supreme Court.

Saunders for the plaintiff.
No counsel for the defendant.

DANIEL, Judge. The writ was in debt, issued on the 29th of April, 1839, returnable to Burke Superior Court. Plea *in abatement*, that, on the day of issuing the writ, neither the plaintiff nor the defendant was a resident of the county of Burke. On the trial of the issue, a brother of the plaintiff's wife deposed, that when the plaintiff *first* went to Yancy from Burke (as stated in the case) it was not regarded in his father-in-law's family (where the plaintiff then resided) as an abandonment of the plaintiff's then place of residence. We are asked, whether this evidence is admissible? The defendant had not proved any declaration made by the plaintiff of his then abandoning his domicile in Burke, but he had offered in evidence certain facts, from which he wished the jury to presume an abandonment by the plaintiff of his domicile in Burke at the date of the writ. To repel an inference of that kind from the facts proved by the defendant, the evidence objected to was offered by the plaintiff to shew how the family, in which he was then living, regarded

this movement of his. How the witness derived his knowledge of the impression of the family, is not stated. He may (307) have so understood it from the conversation which passed between the plaintiff and the members of the family, at the time of his setting off for Yancy, or from the conduct of the plaintiff and family, or from the plaintiff's leaving necessary articles of property, &c. It does not appear that the witness came to this knowledge by the *ex parte* hearsay of any of the members of the family. We are of opinion that what the witness deposed to was a fact pertinent and proper to go to the jury, to repel the presumption attempted to be raised by the evidence given in by the defendant. The judgment must be affirmed.

PER CURIAM. Judgment below affirmed.

DAVID NOWLAND *vs.* THOMAS MARTIN.

One surety cannot sustain an action against his co-surety for money paid for the principal, unless he has actually paid the money, or what is equivalent thereto. Even a note, given by an agent of the surety in the agent's own name, will not support the action, although that note was received by the creditor in satisfaction of his demand.

This was an action of Assumpsit for money paid, &c., tried at the Fall Term, 1840, of Rutherford Superior Court, before his Honor Judge BAILEY. Under the instruction of the court there was a verdict for the plaintiff, a new trial moved for, and the motion overruled, a judgment for the plaintiff and an appeal therefrom by the defendant to the Supreme Court.

The transaction out of which this suit grew, and the facts in relation to it were precisely the same, as in the case of *Brizendine* v. *Martin*, (*ante*, p. 286,) except that the note (308) given, in this case, in satisfaction of the debt and accepted by the creditor, was given by the agent of the plaintiff in his own name, and not by the defendant.

Hoke and Saunders for the plaintiff.
Bynum for the defendant.

RUFFIN, Chief Justice. The facts in the case are precisely the same as those in the case of *Brizendine* v. *Martin* at this term (ante, p. 286) except that the present plaintiff did not give to the creditors his own note for one half of their debt, but his son Hardin Nowland, as his agent, settled the business for his father, and gave his, Hardin's, note to the creditors.

The court was of opinion that, as the son acted as the agent of his father, in settling the debt by his note, the father could maintain the action for money paid.

We do not perceive any ground of discrimination between this case and that of *Brizendine* against the same defendant. If the son had interfered officiously, of course the father could sustain no action. But, no doubt, the son acted under the father's authority, and gave his note on behalf of his father and instead of his father's. Still the father has paid no money, either to the original creditor or to the son. After all, there is but a security outstanding for the debt; and as yet the surety is nothing out of pocket, but only liable for the money.

PER CURIAM. Judgment reversed, and *venire de novo*.

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(309) JONAS JENKINS, JR., *vs.* JESSE C. COCKERHAM.

1. Parol evidence may be received to shew when a writ issued. The act of Assembly directing the clerk to mark the day of issuing process is only directory, and does not exclude other evidence.
2. In an action of slander, the defendant cannot, to support his plea of justification, give evidence of transactions or conversations between himself and others, to which the plaintiff was not privy.
3. In an action of slander, in which the defendant is charged with having imputed perjury to the plaintiff, the plea of justification is not sustained, if the jury are satisfied that the plaintiff was honestly mistaken in what he swore to. In such an action, the plea of justification must contain all the averments, which, if true, constitute the crime of perjury.
4. The cases of *Boyden* v. *O'Deneal*, 1 Dev., 171; *Hamilton* v. *Smith*, 2 Dev. and Bat., 274; *Murphy* v. *McNeil*, 2 Dev. and Bat., 244; and *Roberson* v. *Devane*, 2 Hay., 154, cited and approved.

This was an action on the case for slander, tried at the Fall Term, 1840, of Haywood Superior Court, before his Honor Judge BAILEY. The declaration set forth, in substance, that the defendant had charged the plaintiff with swearing to a lie, upon the trial of an indictment against the defendant for a misdemeanor. The defendant pleaded the general issue, statute of limitations and justification. The plaintiff proved the speaking of the words by the defendant, and then offered to prove by parol the day on which the writ issued, there being no date of its issuing marked upon the writ. The defendant objected to this evidence, but it was admitted by the court.

The defendant, to sustain his plea of justification, offered proof of what the plaintiff swore, upon the trial of the indictment against him, the defendant, for the purpose of shewing that the

plaintiff swore falsely and corruptly. It was in proof that the defendant, Cockerham, had issued his warrant as justice of the peace against one George Southerland and Ann Cham-
(310) bers, charging them with fornication and adultery; that he examined witnesses touching their offence, and caused them to enter into recognizances with sureties for their appearance at the next County Court; that the warrant and recognizances were placed in the hands of one Benjamin M. Enlow, deputy sheriff, by said defendant, with directions to be delivered to the county attorney; that the plaintiff was one of the sureties of the said Southerland and Chambers; that afterwards, on the same day, the warrant and recognizances were burnt by the said Enlow, Southerland and Chambers. A short time before they were burnt, an agreement was made to burn the papers, the plaintiff being present and not objecting.

The defendant was indicted for corruption in his office as a justice of the peace, in procuring and directing the papers to be burnt, &c. The defendant proved that the plaintiff swore upon the trial of this indictment, that he, the defendant Cockerham, examined some of the witnesses before him on the trial of Southerland and Chambers, and, before he concluded the examination of all the witnesses, stopped and said, there was no evidence to bind them over to court. The plaintiff furthermore swore that he and the defendant, a few minutes after the trial, met under a tree, and the defendant then stated to him that there was no evidence to bind the parties, that it would become a county charge, and that the warrant and recognizances might be burnt. The defendant then offered proof that, when he stopped the examination of the witnesses aforesaid, he said he had sufficient proof to bind the parties, and he did bind them. The defendant's counsel then proposed to shew that Cockerham commenced a prosecution against Enlow and Southerland for burning the papers, before the prosecution was commenced against him; and also proposed to shew that the defendant was applied to, in a short time after the conversation with Jenkins, he (Jenkins) not being present, by one Angel, to permit the parties to compromise and stop the proceedings against Southerland and Chambers, and that he refused. This evidence was objected to, on the ground that the prosecution instituted by the defendant
(311) was not against the plaintiff, and that the declaration proposed to be given in evidence was not in the presence of the plaintiff. The evidence was rejected by the court. His Honor then charged the jury that if the words contained in the

plaintiff's declaration were spoken by the defendant to the plaintiff, and that within six months of the issuing of the writ, they should find a verdict for the plaintiff, unless they should be satisfied that the defendant had sustained his plea of justification; that if the plaintiff, in what he swore on the indictment, was mistaken, but not wilfully and corruptly so, the plea was not sustained; but that, if the plaintiff had sworn falsely and corruptly, they should find for the defendant. There was a verdict for the plaintiff. A motion for a new trial was made by the defendant's counsel, because of the rejection of proper testimony, and especially upon the ground of misdirection by the court. He contended that if the defendant proved that the plaintiff had sworn falsely, his plea of justification was sustained, and it was not necessary for him to prove that he swore corruptly and falsely, but that it was for the plaintiff to shew that, although mistaken, he was not corrupt. The motion for a new trial was overruled and judgment rendered for the plaintiff, from which the defendant appealed to the Supreme Court.

Francis for the plaintiff.
No counsel for the defendant.

DANIEL, Judge. Three questions arise in this case. *First*, whether parol evidence could be received to shew when the writ issued. We are of the opinion that the court was correct in overruling the objection to this evidence. The act of Assembly directs the clerk to mark the day of issuing process: this is only directory under a penalty; there is nothing in the act confining the proof of the time to the mark of the clerk on the writ. It was a fact to be proved by the best evidence the nature of the case admitted. *Boyden* v. *O'Deneal*, 1 Dev., 171. *Secondly*, to support the plea of justification, the defendant tendered evidence to shew that he had commenced a prosecution against Enlow and Southerland for burning the papers, before the prosecu-
(312) tion had been commenced against him. And he also proposed to shew, that he was applied to by one Angel to permit the parties to compromise and stop the proceedings, and that he refused; and this, a short time after the conversation with Jenkins, but he, Jenkins, not being present. We are of the opinion that this evidence was properly rejected. *Hamilton* v. *Smith*, 2 Dev. & Bat., 274, was an action for slander, and we then held that transactions between the defendant and others, to which the plaintiff was in no way privy were not admissible in evidence against the plaintiff. In *Murphy* v. *McNeil*, 2 Dev. &

Bat., 244, we held that one party cannot give in evidence a conversation between himself and a third person in the absence of the other party. In *Roberson* v. *Devane*, 2 Hay. Rep., 154, it was held, that after declarations of a party shall not be received to explain his former transactions. These authorities induce us to think that the decision of the Judge was correct. *Thirdly*, the Judge charged the jury that, if the plaintiff was mistaken in what he swore to on the indictment, the plea of "*justification*" was not sustained. We hold that the Judge's instruction in this respect was correct. The defamatory words complained of, charged upon the plaintiff the crime of perjury, and the plea of "*justification*" would have been essentially bad, if it had not contained all the averments, which, if true, established the crime of perjury—a wilful, corrupt and false swearing. See 3d Chitty on Plead., 1033. And it was essential for the support of the plea to prove all its material allegations.

PER CURIAM. Judgment of the Superior Court affirmed.

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(313) Den ex dem. HENRY W. SKINNER AND ELIZABETH HIS WIFE *vs.* FRANCIS FLETCHER.

1. Where a commission issued, by order of a County Court, to take the private examination of a *feme covert* as to her execution of a deed, the recital in the commission that "it has been represented to our said court that M. W. (the *feme covert*) is *indisposed*, so that she cannot travel to our said court," &c. is as effectual as if the same recital had been made in the order of the court directing the commission to issue.
2. The words "indisposed, so that she cannot travel," &c. taken in reference to the subject matter, must mean "unable to travel from sickness."
3. Where the commissioners certified that they took "the *private* examination" of the *feme covert*, and that she acknowledged that "she executed the deed without any compulsion from her husband or any other person," this is sufficient, without saying that she was examined "privily and apart from her husband."
4. On the subject of the examination of *femes covert*, as to the execution of deeds, the phrases "privy examination," "private examination," and "examination separate and apart from her husband," are indifferently used in our acts of Assembly.
5. The case of *Fenner* v. *Jasper*, 2 Dev. and Bat., 34, cited and approved.

This was an action of Ejectment, tried at the Fall Term, 1840, of Pasquotank Superior Court, before his Honor Judge BATTLE. The defendant set up title under a deed executed to him by William W. Freshwater and Mary his wife, in the year 1824, and it was admitted that at the date of that deed the title in fee simple was in the said Mary. The only question was, whether

that deed had been so proved as to pass the title of the *feme covert.* The deed was in the usual form. The probate was as follows: First, an entry on the records of the court in the following words:

"State of North Carolina, } September
Pasquotank County, } Term, 1824.

This deed of bargain and sale from William W. Freshwater and wife to Aaron Fletcher, was exhibited and acknowledged in open court by William W. Freshwater, and on motion
(314) ordered that Ambrose Knox and Thaddeus Freshwater, Esquires, be directed to take the private examination of Mary Freshwater, the wife of the said William, as to her voluntary assent thereto, and make report to December Term next.
Teste, CHARLES GRICE, Cl'k."

By virtue of which order a commission issued from the said court in the following words, to wit:

"State of North Carolina

To Ambrose Knox and Thaddeus Freshwater, Esquires, justices of the peace for the county of Pasquotank, Greeting:

Whereas Aaron Fletcher hath produced a deed of conveyance made to him from William W. Freshwater and Mary his wife, of a certain tract or parcel of land, lying and being in the county of Pasquotank, in the State aforesaid, and procured the same to be proven in the court of the said county of Pasquotank, and it being represented to our said court that Mary Freshwater, the wife of the said William W. Freshwater, is indisposed, so that she cannot travel to our said court to be privily examined as to her free consent in executing the said conveyance, know ye that we, in confidence of your prudence and fidelity, have appointed you and by these presents do give unto you or any two of you full power and authority to take the private examination of the said Mary Freshwater, wife of the said William W. Freshwater, concerning her free consent in executing the said conveyance. And therefore we command you or any two of you, that at such certain day and place as you shall think fit, you go to the said Mary Freshwater, if she cannot conveniently come to you, and, privily and apart from her husband, examine her, the said Mary Freshwater, whether she executed the said conveyance, freely and of her own accord, without fear or compulsion of the said William W. Freshwater, her husband; the examination being distinctly and plainly wrote on the said deed or

on some paper annexed thereto; and when you have so taken the said examination, you are to send the same closed up under the seal of you or any two of you, together with this writ, to our said court, to be held for the said county of Pasquo-
(315) tank, at the court house in Elizabeth City, on the 1st Monday of December next ensuing. Witness, Charles Grice, clerk of the said court, at Elizabeth City the 6th day of September, 1824, and in the 49th year of our independence.

CHARLES GRICE, Cl'k."

Upon this writ the said commissioners returned as follows, annexing the commission and the return to the deed, to wit:

"Agreeable to the within commission to us directed, we have proceeded to take the private examination of Mary Freshwater, wife of William W. Freshwater, relative to her voluntary assent in the execution of the annexed deed, who saith she did execute the same without any compulsion from her husband or any other person whatever. Given under our hands and seals the 6th day of November, 1824.

AMBROSE KNOX, [Seal.]
THADDEUS FRESHWATER, [Seal.]"

The clerk then entered upon his record as follows, to wit:

"State of North Carolina, Pasquotank County, } *ss.* December Term, 1824.

Ambrose Knox and Thaddeus Freshwater, Esquires, to whom the within commission issued, directing them to take the private examination of Mary Freshwater, wife of William W. Freshwater, report that she acknowledged to have signed the same of her own free will and accord, and without any compulsion from her said husband. Ordered to be registered.

Teste, CHARLES GRICE, Cl'k."

And on the deed was endorsed the following certificate from the register:

"Registered in the Register's office of Pasquotank county, January 13, 1825, in book X, pages 127, 128 & 129, by

JOHN C. EHRINGHAUS, P. Reg."

A verdict was taken for the plaintiff, subject to the opinion of his Honor, whether the defendant had acquired the title of Mary Freshwater. His Honor being of opinion that the deed as proved did not pass the title of the *feme*, gave judgment for the

plaintiff, from which the defendant appealed to the Supreme Court.

(316) *A. Moore* for the plaintiff.
Kinney for the defendant.

DANIEL, Judge. The order of the County Court, granting a commission to take the private examination of the *feme covert* to the deed given by Freshwater and his wife to the defendant, does not contain any suggestion that she was "so infirm" that she could not travel to court to be examined. But the commission, which issued upon that order, contains these words, "and it being represented to our said court that Mary Freshwater, wife of said William Freshwater, is indisposed, so that she cannot travel to said court &c." The commission was executed by the commissioners and duly returned, and the court ordered the deed, the commission and report to be registered, which was done accordingly. The word *indisposed* has two meanings: it may mean unwilling to travel, or it may mean unable to travel from sickness. The latter meaning must be assigned to the word, when we read it in connection with its context. The County Court is limited in its power to grant commissions of this kind, and therefore it is necessary that the proceedings should shew that the court acted within the sphere of its limited jurisdiction, as no intendment would be made that it had so acted. In *Fenner* v. *Jasper*, 2 Dev. and Bat., 34, a remark fell from the court, which would seem to imply that the suggestion should appear in the order made by the court; but it is afterwards distinctly stated that the suggestion must appear either in the order or the commission. The case, we still think, was correctly decided, for there was not a proper fact suggested, either in the order or the commission. In the case now before us, we are of the opinion that the proceedings of the County Court do shew, that they acted within the limits of the power given them by the acts of the Assembly.

Another objection to the validity of the deed arises upon the report or return of the commissioners. The report is not couched in definite or precise language; but we think, nevertheless, the meaning of it cannot be well misunderstood, and, fairly
(317) considered, it is a fulfilment of the demands of the act of Assembly. The commissioners, in their report, say, that they proceeded to take the *private* examination of Mary Freshwater, relative to her voluntary assent in the execution of the annexed deed; and on the said private examination as to her

voluntary assent, they received this answer, "that she did execute the same, without any compulsion from her husband or any other person whatever;" which answer could not be true, unless she executed the deed without the physical or moral force of her husband or any other person; and therefore she executed it voluntarily and of her own free will. The words of the act, passed in 1751, sec. 3, (Rev. Stat., c. 37, s. 10,) run thus: "And such deed acknowledged before them (commissioners) after they have examined her privily and apart from her husband, touching her consent," &c. The phrases "privy examination," "private examination," and "examination separate and apart from her husband," are indifferently used in our acts of Assembly, when speaking of the examination of a *feme covert*, touching her voluntary assent to the execution of a deed; as in the ancient law respecting her examination on acknowledgment of a *fine*, to convey one and the same idea, an examination "when delivered from her husband, and therefore her judgment free." *Hearle* v. *Greenbank*, 2 Atk., 712. It is enough that the commissioners have certified that the examination was private.

It seems to us, therefore, that the deed was sufficiently executed and authenticated to pass the land. There must be a new trial.

PER CURIAM. Judgment reversed and new trial awarded.

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(318) THE STATE OF NORTH CAROLINA to the use of C. W. BUCKLEY *vs.* HENRY G. HAMPTON.

1. A creditor, who has an execution in the hands of a sheriff, has a right to recover from him such a proportion of the value of the property, which ought to have been sold, as would, if there had been a sale according to the duty of the sheriff, have been applicable to his execution.
2. It is not only the duty of the sheriff, when he receives a *fieri facias*, to seize property, if he can find it; but it is also his duty to sell the property seized before the return of the writ, unless he have some lawful excuse for not doing so—such as the want of time or of bidders, or the indulgence of the creditor. For a failure in this respect he is liable to an action on his official bond, in which there must be a recovery of, at least, nominal damages.

This was an action of Debt, tried at Surry Superior Court of Law, before his Honor Judge PEARSON, at the Fall Term, 1840. The plaintiff declared on the official bond of the defendant as the sheriff of Surry county, and assigned as a breach that he had not sold property levied on to satisfy an execution at the instance of C. W. Buckley, the relator in this case, against one

Dabney Walker. The jury found a special verdict upon which his Honor rendered judgment for the defendant, from which the plaintiff appealed to the Supreme Court.

The facts of the case so far as they are material, are set forth in the opinion delivered in this court.

Boyden for the plaintiff.
J. T. Morehead for the defendant.

RUFFIN, Chief Justice. This was an action of debt on the official bond of the defendant as sheriff of Surry county; and the breach assigned is for not duly executing a writ of *fieri facias*, in favor of the relator against one Walker for $1,192 and costs, by a sale of property taken thereon by the sheriff. The plea was "conditions performed," and issue was taken thereon. (319) On the trial a case was stated, on which the jury found a verdict for the plaintiff for the whole amount of the relator's debt and costs; but subject to be corrected by reducing the damages to five cents, if, in the opinion of the court, the relator was entitled to nominal damages only; or to be set aside and a verdict entered for the defendant, if, in the opinion of the court, the relator had sustained no injury and was not entitled even to nominal damages.

The following is the substance of the case reserved: The relator recovered a judgment against Walker in the Superior Court of Surry on the 1st Monday of September, 1836, and thereon issued a *fieri facias*, and delivered it to the sheriff on the 17th of November, 1836. On the 15th of December, the sheriff endorsed thereon a levy in these words: "Levied on 1,300 acres of land, adjoining T. B. Wright and others, in seven different tracts; three negroes, Dinah, Rachel and Martha, a yoke of steers and cart, 5 head of horses, 20 head of hogs, 8 head of cattle, and all the defendant's household and kitchen furniture, subject to older executions previously levied." And at March Term, 1837, returned the writ with that endorsement and nothing more. The plaintiff then commenced this action. The property mentioned in the return was not of greater value than the sum of $2,000. At the time the relator's execution was delivered, and at the time of its *teste*, the sheriff had in his hands writs of *fieri facias*, at the suit of other creditors of Walker, bearing *teste* before that of Buckley, to the amount of about $10,000, which the sheriff had levied on the same property, and on which he did not sell, because the creditors therein instructed him not to do so. On these writs the sheriff returned

the levies, and that "the plaintiffs had indulged." At the same time the sheriff had in his hands other writs of *fieri facias*, bearing *teste* before that of Buckley, to the further amount of near $10,000, which he had also levied on the same property, and on which, without any directions from the plaintiffs therein, he omitted to sell, and made a return of the levies and "not satisfied." After the institution of this suit, the sheriff, on writs of *venditioni exponas*, founded on his returns before mentioned, made a sale in the summer of 1837, and paid the money
(320) into court, where the whole of it was applied to the executions that were older than the relator's.

The counsel for the plaintiff contended that the class of creditors, who had directed the sheriff not to proceed on their executions to a sale, thereby lost their priority, and that the sheriff should have sold on the relator's execution and satisfied it: and, likewise, that the delay of the sheriff, and his neglect in not proceeding on the writs of the other creditors, who did not instruct him not to sell, gave those creditors their remedy against the sheriff, and was as injurious to the relator, as if the sheriff had acted upon instructions, and not upon his own responsibility; and therefore that those executions did not protect him against the relator. For which reasons it was insisted, that, as the property seized was of greater value than the relator's claim, the verdict should stand as first given by the jury. The court, admitting that the indulgence given by the first class of creditors did deprive them of their preferable right of satisfaction, was of opinion that the second class of creditors did not lose their priority by the negligence of the sheriff; and, as the property was not of value sufficient to satisfy those creditors, that the relator would not have been entitled to any part of the money that would have been raised by the sale, if one had been made. For which reasons the court was further of opinion, that the relator had sustained no damage from the failure of the sheriff to sell, and therefore could not maintain an action therefor; and directed a verdict and judgment to be entered for the defendant, from which the relator appealed.

We concur in the opinion that the relator was not entitled to retain his verdict for his debt and costs. Upon the principle insisted on for him, the sheriff made himself liable to the whole second class of creditors and to the relator for about $11,000 by not selling property to the value of $2,000. But that cannot be true. At the utmost a creditor is entitled to recover from the sheriff such a proportion of the value of the property, which

ought to have been sold, as would, if there had been a sale according to the duty of the sheriff, have been applicable to the execution of that creditor. Now, the other creditors,
(321) who did not interfere with the due execution of their writs, no more lost their rights, as against the property, by the neglect of the sheriff to sell on them, than the relator lost his right by the sheriff's default on his writ. Each can recover from the officer the damages sustained by himself from the consequences to him of the default. If the sheriff had made no default here, but had sold the property, the proceeds would have gone to those creditors, who had been more diligent than the relator in getting execution, and who, not more than himself, had impeded the action of the sheriff thereon. Indeed, under the circumstances here, the sheriff might have refused to consider the property as seized under the relator's execution, and have well returned *nulla bona*. The relator has therefore sustained no substantial loss, and could not justly claim more than nominal damages.

But clearly we think he is entitled to nominal damages. Wherever one person binds himself to another by contract to do a particular act, or is charged by the law to perform an act as a duty to another person; in either case the non-performance is, legally speaking, necessarily an injury to the person, to whom the duty ought to have been performed; and for every injury the law intends some recompense, though for some it may deem a nominal recompense adequate. In this case the sheriff might justifiably have returned *nulla bona*. He did not think proper to do so and take the risk of an action for a false return; but he chose to levy the relator's execution on the property, and thereby to admit that, after satisfying preferable executions, there might be something left to be applied to the relator's satisfaction. Now, it is not only the duty of a sheriff, when he receives a *fieri facias*, to seize property if he can find it, but it is also his duty to sell the property seized before the return of the writ, unless he have some lawful excuse for not doing so, such as the want of time or of bidders, or the indulgence of the creditor. Here there was no sale, nor any excuse for not selling; and therefore an action arose to the relator, upon the return of the writ, which was not defeated by the subsequent events. It is no answer to his claim for damages, that he would have
(322) received none of the proceeds of a sale, if it had been made; for it is for the benefit of the creditor to know even that in apt time. It may save him, if nothing else, the

useless expense of another execution on his judgment. At all events, he has a right to know all that can be done on his execution and what is the state of his debt, in order that he may adopt such other means for its recovery, as the knowledge of what has been done may suggest. In *McRae* v. *Evans*, 1 Dev. & Bat., 243, it was held that not returning an execution, *simpliciter*, gave the plaintiff an action, though it entitled him to but nominal damages. That was on the same principle, which governs the present case. A sheriff is bound to sell goods seized, or to attempt to sell them; and for a failure to do either, he is certainly liable to the plaintiff's action, in which there must be a recovery of nominal damages at the least.

Our opinion, therefore, is, that the judgment must be reversed, and the verdict for the plaintiff re-instated, but the damages reduced to five cents; for which and the costs there must be judgment against the defendant.

PER CURIAM. Judgment accordingly.

CONSTANTINE W. BUCKLEY *vs.* HENRY G. HAMPTON.

1. A return by a sheriff on a *fieri facias* that "he has levied on goods, subject to older executions," without saying whether he had sold the property seized or still had it in his hands, or, if the latter, why he had not sold—whether for want of bidders, or of time, or other sufficient excuse—is not a "due return," because it does not answer the writ.
2. The sheriff who makes such a return is, therefore, liable to the fine of $100 imposed by the act of 1777 (Rev. St., c. 109, s. 18) for not making due return of process placed in his hands.

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This was a *Scire Facias* against the defendant as sheriff of Surry county, for not making due return of a *fieri facias*, directed to him and placed in his hands, at the instance of the plaintiff against one Dabney Walker. The sheriff returned on this execution, "levied" (on certain property, mentioning it) "subject to older executions." It appeared on the trial that the property levied on was worth about 2,000 dollars, and that the defendant, as sheriff, had in his hands executions, entitled to preference over the plaintiff's to the amount of $10,000, under some of which the property was afterwards sold, and the proceeds applied to the prior or preferred executions. The cause was tried before his Honor Judge PEARSON, who was of opinion, from these facts, that the sheriff was not subject to an amercement for not selling at the instance of the plaintiff, because there were other executions having a

priority of lien, to an amount much more than all the property of Walker could have been sold for, and if there had been a sale, plaintiff would have been entitled to receive nothing, and so was not damnified, and the defendant might have returned "*nulla bona;*" and the Judge quashed the *scire facias*, from which judgment the plaintiff appealed.

Boyden for plaintiff.
J. T. Morehead for defendant.

RUFFIN, Chief Justice. This is a *Scire Facias* against the sheriff of Surry county, to obtain execution of a fine of $100, in which he had been amerced *nisi* for not making due return of a writ of *fieri facias* at the instance of Buckley against one Walker, returnable to March Term, 1837, of the Superior Court.

The execution in question is the same that is mentioned in the action, determined at the present term, which was brought on the official bond of the defendant by Buckley, as relator. (See ante, p. 318.)

Upon the return of the execution of Buckley, and upon the other facts, as stated in the case reserved in the other cause, which the parties to the present proceeding admit to be true,

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the court was of opinion, that the sheriff was not subject to the amercement, because there were other executions to an amount much larger than the value of all the property of Walker, which were entitled to a priority over Buckley's; for which reason the sheriff might properly have returned *nulla bona*. The court, therefore, quashed the *scire facias*, and Buckley appealed.

The decision was, in our opinion, erroneous, and must be reversed. His Honor, we think, mistook the question in the case. It was not what return the facts, as really existing, would have authorised the sheriff to make; or what damage was done to the plaintiff by the acts of the sheriff, or by his return as made. But the question was singly, whether the return, as made, was such as a sheriff, according to the law and his duty, ought to make: in other words, whether the sheriff "made *due* return" of the writ, as by the act of 1777 he is bound to do. If he had returned *nulla bona*, that would have been "due return." It is a return known to the law, and is a full answer to the precept. The court, therefore, would have received it without regard to its being true or false; and, if false, leave it to the party injured to seek his redress by an action. But the sheriff did not return *nulla bona*. On the contrary, he returned goods subject to older

executions, without saying, whether he had sold the property seized, or still had it in his hands; or, if the latter, why he had not sold—whether for want of bidders, or of time, or other sufficient excuse. Such a return is not a "due return," because it does not answer the writ. The law requires the sheriff to sell the property, if he can; and, if he cannot, then, for obvious reasons, it requires him to return, what property he has seized, what part he has disposed of, what part remains in his hands, and the reason why he did not sell that also. If not, the sheriff might keep the property in his hands forever. The omission of those material parts of a proper or "due" return is tantamount to the neglect to make a return at all.

The judgment must, therefore, be reversed and judgment here awarding execution for the fine and costs.

PER CURIAM. Judgment accordingly.

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(325) STATE on relation of SAMUEL SHERRILL *vs.* JAMES NATIONS & al.

1. In an inquisition and proceedings had before justices under our statute of *Forcible Entry and Detainer*, (Rev. St., ch. 49,) if the verdict of the jury sets forth that "the relator was possessed as tenant for years of A. B." that is sufficient without specifying what that term is.
2. An objection to an inquisition for forcible entry and detainer, that the relator has elected to proceed by indictment, is of no avail, as our statute does not give the justice any power to fine.
3. When the proceedings on an inquisition of *Forcible Entry and Detainer* before Justices of the Peace are brought up by *certiorari* to the Superior Court, that court has no right to order a *traverse* to be tried before them, as traverse either has been tried, or might have been tried before the jury required to be summoned by the justices below, and no appeal is allowed by statute, the remedy being a summary one.
4. If the justices were guilty of misconduct in the trial below, either by receiving improper testimony or rejecting proper testimony or otherwise, the Superior Court can correct this misconduct; but the affidavits to obtain a certiorari must state explicitly the facts upon which the interference of the Superior Court is called for.
5. Upon a proper affidavit a *mandamus* as well as a *certiorari* will be granted to compel the justices to return all proceedings, as they actually occurred.

This case was commenced in the Superior Court of Law for the county of Haywood by a writ of *Recordari* and *Certiorari*, issued at the Fall Term, 1838, of that court, on the petition and affidavit of the defendants, and directed to certain justices of the peace of that county, who had had an inquisition of forcible entry and detainer at the instance of the plaintiff against the

defendants. The justices made the following return, which was filed of record to wit: (*a*)

"State of North Carolina, } *ss.*
Haywood county, }

A record of the proceedings had before Joseph Keener (326) and J. L. Dillard, Esquires, justices assigned to keep the peace for said county at Holland's old fields, on Oconoluftee river in said county, under the act of Assembly of 1837, Rev. St., c. 49, s. 7.

On the third day of March, 1838, the sheriff, A. G. Howell, returned, before us the following precept:

State of North Carolina, } *ss.*
Haywood County. }

Joseph Keener and J. L. Dillard, Justices of the Peace for said county, to the Sheriff of said county, greeting:

We command you, that you cause to come before us at Holland's old fields on the Oconoluftee river in the county aforesaid, on the third day of this instant, twenty-four sufficient and indifferent men, of the neighborhood of Oconoluftee aforesaid, in the county aforesaid, being freeholders, to inquire upon their oath of a certain entry and detainer made with strong hand, as it is said, into the messuage and possession of one Samuel Sherrill, tenant for years of the heirs of James Holland, at Oconoluftee aforesaid, in the county aforesaid, against the form of the statute in such case made and provided; and you are to return upon every of the jurors by you in this behalf to be empannelled, twenty shillings of issues at the aforesaid day, and have you then and there this precept; and this you shall in no wise omit, upon the peril which shall thereof ensue. Witness the said Joseph Keener and John L. Dillard, Esquires, in the county aforesaid, on the first day of March, 1838.

(Signed) JOSEPH KEENER, [SEAL.]
J. L. DILLARD, [SEAL.]

Upon the back of which the sheriff made the following endorsement and return, to wit:

"According to the within warrant, I have summoned the fol-

(*a*) NOTE. As no case of Forcible Entry under our Revised Statute has before been brought before the Supreme Court, the Reporter hopes he shall be pardoned for giving this record more in detail, than he has been in the habit of doing. Of course no opinion is expressed as to the correctness of the precedent, except so far as the Supreme Court has confirmed it.

lowing within named persons as Jurors of Inquiry," (here follow the names of thirteen persons) "and do hereby endorse to each juror twenty shillings, which makes twenty-four dollars. I set my hand and seal. A. G. HOWELL, Sh'ff."

Before the jury were called over, the defendants being present, were informed by the sheriff that they could make
(327) any objection to the jury, as they were called, and before they were sworn, upon which they challenged John B. Love, and another was sworn in his place. John P. Adams and Nelson G. Howell were then examined as witnesses in behalf of the complainant, the first of whom proved an entry by defendants with force, and the second some threats by defendants to detain by force. Whereupon the defendants called one Sherrill, son of complainant, as a witness for them, and no objection being made by complainant, he was permitted to be examined. He proved his father's possession under a lease of Thomas Love, agent of Holland's heirs, the entry of defendants on said possession, and that said lease had not expired at the time of said unlawful entry by defendants. Whereupon the jury retired and returned a verdict of *forcible entry and detainer* against the defendants, which was afterwards drawn up in the following form and signed by the jurors, (to wit:)

State of North Carolina, } *ss.*
Haywood County. }

An inquisition for the State, taken at &c., the 3d day of March, 1838, by the oaths of (here the jurors were named) good and lawful men of the said county, before Joseph Keener and John L. Dillard, two of the justices &c., who say upon their oaths aforesaid, that Samuel Sherrill, of the county aforesaid, planter, long since *lawfully and peaceably was possessed as tenant for years* of the heirs of James Holland, dec'd, of and in one messuage, &c., (describing it,) and his said possession so continued until the defendants (naming them) and other malefactors unknown, on the 28th day of February, 1837, with strong hand and armed power into the messuage aforesaid, &c. unlawfully did enter and him the said Samuel Sherrill therefrom, with strong hand, expelled; and the said Samuel, so dispossessed and expelled from the said messuage, &c., from the said 28th day of February, 1837, until the taking of this inquisition with like strong hand and armed power, did keep out, and do yet keep out, to the great disturbance of the peace of the State, and against the

form of the statute in that case made and provided. In
(328) testimony whereof as well the said justices as the inquest above named to this inquisition, interchangeably set their hands and seals the day and year first above written.

(Signed and sealed by the Jurors and Justices.)

State of North Carolina, } *ss.*
Haywood County, }

It is adjudged by us in this case, according to the foregoing inquisition, that the defendants (naming them) being guilty of *forcible entry and detainer* and the costs of said inquisition, amounting to twenty-four dollars, therefore judgment is rendered against the said defendants (naming them) for the said amount. Witness our hands and seals, this 3d day of March, 1838."

(Signed and sealed by the Justices.)

Upon which the following writ of restitution, (signed and sealed by the said justices) issued to the sheriff:

[Here follows the writ, and the return of the sheriff, that he had dispossessed the defendants and put the plaintiff in possession of the premises. Then a certificate of the justices that they had returned a true and perfect record of their proceedings, &c.]

The cause came on for hearing at Fall Term, 1840, before his Honor Judge BAILEY, when the defendants moved to quash the proceedings, which motion was overruled by the court. His Honor then, upon motion of the defendants, permitted an issue to be made up and tried by a jury as to the *forcible entry and detainer;* upon which trial the plaintiff, in submission to the opinion of the court, suffered a nonsuit. From the judgment of the court the plaintiff appealed to the Supreme Court.

Francis for the plaintiff.
Bynum for the defendant.

DANIEL, Judge. This is a writ of *Recordari*, removing into the Superior Court an inquisition and proceedings, had before justices under the statute of *Forcible entry and Detainer.*

In the Superior Court the defendants moved to quash, first, on the ground that the *term* of the relator was not set out in the
verdict of the jury of inquisition. The verdict states
(329) that the relator "was possessed as tenant for years of the heirs of James Holland." This, we think, is sufficient. The 6th section of our act of Assembly (Rev. St., c. 49) is copied from the stat. 21, Jac. 1, c. 15. Under that statute, the verdict must shew that the party injured was possessed of

such an estate as will bring him within its provisions; and upon this ground, it has been resolved that such a verdict, setting forth in general that the party was possessed, or that he was possessed for a certain term, without adding, that it was for years, is not good. 1 Hawk. Pl. C., 505, sec. 38. But if the verdict finds that the person entered upon was possessed for a certain term of years, it is good and sufficient. The verdict in this case has found that the relator was possessed of such an estate, as brings him within the 6th section of our act of Assembly.

The *second* ground, taken by the defendants to quash, was that the relator had elected to proceed by indictment. There is nothing in the case sent here to shew, that an indictment had ever been preferred; much less a conviction or acquittal on it. The act of Assembly does not give to the justice any power to fine. The court was correct in overruling both propositions taken. The defendants then tendered a *traverse;* the court received it, and caused a jury to be impannelled, when, as the case states, a judgment of nonsuit was entered. We are of opinion that the court erred in permitting a traverse in this case. In England, under their statutes, an inquisition taken before justices is frequently *ex parte* and in the nature of a bill of indictment. If the jury find the original entry to be illegal and a forcible detainer, the justice cannot award restitution, without giving the defendant an opportunity of traversing the inquisition; he should call him to answer, for no one ought to suffer without an opportunity to defend himself. 1 Hawk. P. C., 541, sec. 60. If the defendants have notice, they may tender a *traverse* to the inquisition, (it must be in writing, it is said;) and then the justices or justice should award a *venire facias,* whereon a traverse jury must be returned to try the force and other material allegations. 1 Hawk. P. C., 541; 2 Chitty's Gen. Prac., 240, 241. And no restitution shall be awarded until the trav-
(330) erse jury find the force, unless the defendant should decline traversing. 3 Salk., 169; 2 Chit. Gen. Prac., 241. If the defendants decline to traverse, it is then like a submission to an indictment, and the judgment may be rendered. In the case before us the defendants *had* actually all the benefit of a traverse before the jury that took the inquisition. They were present and examined witnesses; they declined to tender any formal traverse to the inquisition, which was found, and therefore the award of restitution by the justices was agreeable to law. The defendants when they obtained this *recordari,* did not make any affidavit of misconduct or irregularity in the justices,

in receiving improper testimony or refusing proper testimony, or otherwise. If there had been misconduct in the justices, it certainly could have been corrected in the Superior Court. 2 Chitt. Gen. Pr., 241; *Rex* v. *Jones*, 1 Stra., 474; Bac. ab. Forcible Entry, G. The mode of correcting it is, on a motion for a *certiorari* to state explicitly all the objections to the proceedings; and if it be apprehended that the justices will not faithfully return all the proceedings as they occurred, but will attempt to state them in an improved manner, then, upon a special affidavit of the facts, a *mandamus* as well as a *certiorari* may be obtained to compel them to return every stage of document and proceeding according to the facts. And if the court should be of opinion against the sufficiency of the proceedings before the justices, they will then quash the conviction, and must, as of course, issue a writ of re-restitution. 2 Chitt. Gen. Pr., 241. The power given to justices to make inquisition of forcible entry and detainer is summary; and it was intended that justice should be done in an expeditious manner. There is no appeal given by the statute. If the defendants have notice and the traverse jury find the force, and the proceedings are regular, or if the defendants decline to traverse, they must restore the possession, if the relator be tenant for years or has a greater estate in the land. If the defendants have any title, they must bring their action of ejectment, and obtain possession in a peaceable manner.

This case, as it stood before the Superior Court, was only in the nature of a writ of error. The duty of the court,
(331) on a motion to quash, was only to examine the case recorded and sent up there, and see whether the taking of the inquisition and the awarding of restitution by the justices were agreeable to law.

We are of the opinion that the order made, permitting the defendants to traverse the inquisition in the Superior Court, and the proceedings on that traverse, must be reversed, and that judgment be rendered, affirming the proceedings before the justices.

PER CURIAM. Judgment accordingly.

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(332) MILTON HOBBS & WIFE & al. *vs.* R. N. & B. CRAIGE & al.

1. An executor or administrator may be called to account by petition or bill in Equity by the legatees or next of kin, before the expiration of two years from the time of probate or of administration granted. The act of Assembly compels them to settle within that time, but does not authorise

them to defer the settlement without necessity. The court, to whom the bill or petition is presented, can prevent any premature decision, which may do injustice to the executor or administrator.

2. On an account upon a petition or bill against the administrator or executor, he should not be charged with monies which he had not collected or which he had not by reasonable diligence been able to collect.

3. As to matters, where it was doubtful whether he could collect or not, these should be left to a future account, the plaintiffs, in the mean time, taking a decree *in part* for what was certainly due.

4. Where the answer of executors or administrators to a petition or bill to account, sets forth a joint receipt and joint administration of the assets, the commissioner is not required to report what each received respectively.

5. It is not a good exception to a commissioner's report that the proper parties have not been made to a petition or bill; that is an objection against the petition or bill itself.

6. Where the surplus of an estate is left by will to be equally divided "between the heirs of A. B. and the heirs of C. D.," the children or heirs of A. B. and C. D. take *per capita* and not *per stirpes*.

7. Where one of several joint legatees is not a party complainant in a suit for the legacy, nor any process served on him, nor any good reason assigned for this omission, the other legatees cannot sustain their bill or petition.

8. But the Supreme Court, instead of dismissing the bill or petition, will remand it to the court below, and direct the plaintiffs to pay the costs in the Supreme Court.

9. The cases of *Ward* v. *Stowe*, 2 Dev. Eq., 509, and *Bryant*, adm. &c, v. *Scott*, 1 Dev. and Bat., 155, cited and approved.

This was a petition filed in the Superior Court of Davie county, calling upon two of the defendants, executors of Anderson E. Foster, to account for his estate and pay the petitioners their share of the surplus as devised to them and others, and making others defendants, who were alleged to be also legatees of this surplus.

The facts and pleadings in the case are fully set forth in
(333) the opinion of the court. The exceptions by the defendants to the report of the commissioner, made in the case upon the accounts of the executors and referred to in the opinion of the court, are these:

1st. That from the involved situation of the estate, the defendants had not time to settle the estate.

2d. That owing to the absence of one of the executors, fully acquainted with the estate, and who was expected back in time to attend to the taking of the accounts, great injustice may be done to the executors.

3d. That from the fact that the account was only filed on Thursday of this term, from the complicated nature of the account, not sufficient time was given to the defendants to give it a careful examination.

4th. That the report does not set forth how much of the assets came into each of the executor's hands.

5th. That all the parties, concerned in the matter, are not properly before the court, or the cause placed in such a situation as to them that it can be finally determined.

6th. That the defendants are improperly charged in the account with a claim against Elizabeth Nesbitt for the sum $1000 or $1200, for which a suit is now pending against Mrs. Nesbitt, in which she seeks to get rid of the claim or reduce it by sets off.

7th. That the commissioner has divided the balance equally between the children of David Craige and Samuel Foster *per capita*, when, agreeable to a fair construction of A. E. Foster's will, the balance should be divided *per stirpes;* in other words, that one half of the balance should be divided among the children of David Craige, four in number, and the other half among the children of Samuel Foster, five in number.

8th. That the commissioner has charged them with certain claims, one against Robert Huie, amounting to $400, and with a claim on John Jones for $650, against which the defendants have set off to discharge the claims or to reduce them; that, owing to the absence of Robert Huie in another State, who is likewise connected with Jones' debt, at the taking of the
(334) account by the commissioner, the defendants were unable to adjust the matter and obtain the proper vouchers.

9th. That the commissioner has charged them for a claim against Robert Foster, the proceeds of a sale of a tract of land, which amount depends on a suit instituted by Robert Foster against the defendants to rescind the contract, and recover back the purchase money.

10th. That the commissioner has not given them credit for bad or desperate debts or amount of counter claims against accounts.

11th. That the defendants have not received credit for the sum of $15 paid Joseph Todd, cryer at the sale, and $5 paid Henry Giles for counsel concerning the estate, the vouchers having been mislaid.

12th. That the report does not shew the claim which the defendants have against the plaintiffs or one of them, having been a large purchaser at the sale.

13th. That by the will of A. E. Foster, the defendants are to do certain work about the family burying ground, and to pay

the expense out of the estate, and which work they have not been able to accomplish.

14th. That by the said will Jane McCarter, a legatee in the will, is to receive a year's provision as well as provision for four hands for a year. The executor Burton Craige, being her guardian, these provisions were furnished by him, and the defendants are entitled to credit therefor. Owing to the absence of Burton Craige, the other defendant was unable to lay the proper proof before the commissioner in order to obtain the proper credit.

15th. That the commissions allowed by the commissioner are not adequate to the services rendered.

16th. That proper allowance has not been made for costs in defending suits.

The cause coming on to be heard before his Honor Judge SETTLE, at the Spring Term, 1840, of Davie Superior Court of Law upon the petition, answers, report of the commissioner and exceptions thereto, it was ordered that the exceptions be overruled and the report confirmed, and a decree was thereupon made, for the amount found by the report, in favor of
(335) the plaintiffs. From this decree the defendants appealed to the Supreme Court.

Wm. H. Haywood for plaintiff.
Alexander for defendant.

GASTON, Judge. This case comes before us by an appeal from a decree of the Superior Court of Davie, rendered in a proceeding by petition. On an inspection of the record, it appears that at the Spring Term, 1838, of that court, the petition was filed by Milton Hobbs and Irene his wife and Sarah Foster, against Robert N. Craige, Burton Craige, Samuel Craige, John Craige, Giles Foster, Ellis Foster, Berry Foster and his wife Mary, but that subsequently, by permission of the court, Giles Foster and Berry Foster and wife were stricken out of the bill, as parties defendants, and, instead thereof, made parties plaintiffs. In the petition it was charged, that Anderson E. Foster had died in the month of May, 1836, having previously duly executed his last will and testament, whereof he appointed the defendants Robert and Burton, executors, and which, after his death, the said Robert and Burton caused to be duly proved; that by the said will, after some special devises and legacies, he disposed of all the residue of his estate real and personal in the following terms, viz: "The balance of my property to be applied to the payment of my debts; should there be a surplus, it is my will

that it be equally divided among the heirs of my deceased brother, Samuel Foster, and the heirs of David Craige." And the petitioners alleged, that the petitioners, Irene, Sarah, Giles and Mary, together with the defendant, Ellis Foster, were the persons intended and designated in the said will by the description, "the heirs of my deceased brother, Samuel Foster," and the defendants, Robert, Burton, Samuel, and John Craige, were the persons thereby designated as the heirs of David Craige; they charged that of the residuum aforesaid so devised and bequeathed, a large sum, after satisfying all the just debts of the testator, remained in the hands of his executors; and they prayed that they might be compelled to account for their administration of their trust as executors, and be compelled to pay over
(336) to the petitioners, respectively, what might be found due upon taking such account. The defendants, Samuel and John Craige, filed their answers, and thereby insisted that according to the proper construction of the will, "the heirs of Samuel Foster" were to take one moiety, and "the heirs of David Craige" were entitled to the other moiety, the equality of division there directed being between the roots or *per stirpes* and not *per capita* or among the individuals, embraced within those classes. The defendants, Robert and Burton, also put in an answer, in which the same question was raised, and in which they also contended that the petition had been filed prematurely, before the petitioners were entitled to demand an account or payment of what might be due them thereupon. The defendant, Ellis Foster, does not appear to have been served with any process, or to have entered his appearance to the suit, nor have any proceedings been had against him. At the Spring Term, 1839, an order was made that the cause should be referred to John Clement to take an account, and at the Fall Term, 1839, the commissioner returned his account, to which the defendants filed exceptions. All of these exceptions were upon argument at the same term overruled and the report confirmed, and thereupon it was decreed that the petitioners, Hobbs and wife, should recover of the defendants, Robert N. Craige and Burton Craige, the sum of $1,050.40½ cts., the petitioners, Berry Foster and wife, should recover the like sum, and the petitioner, Sarah Foster, the like sum; and that the petitioners should respectively before suing out execution, execute bonds payable to the Chairman of the County Court of Davie, in the penal sum of $2,110.81 cts., with security, to be approved by John Clement, Esq., conditioned to indemnify and save harmless the said Robert N. Craige and Burton Craige,

and to refund to them their proportionable parts of all such sums of money as might be thereafter recovered of them as the executors of Anderson E. Foster, deceased, by means of any suit or suits that might be thereafter commenced against them, or any sets-off which might be allowed in any suit then pending; that the costs of taking the account should be paid out of the estate of Anderson E. Foster, and the residue of the costs be
(337) paid by the said Robert and Burton. From this decree the defendants appealed.

There is no error in the interlocutory order directing the accounts to be taken. The act of Assembly, making it obligatory on executors to settle the estate at the end of two years after their administration shall have begun, does not authorise them to defer the settlement until that time without necessity. And it is competent to those interested to file their bill or present their petition for such a settlement, as soon as they think proper, the proceedings upon such bill or petition being under the control of the court, who can prevent a premature decision thereon, and have the question of costs at their disposition.

We have examined the exceptions taken to the report of the commissioner, and think there was error in overruling the 6th of these exceptions. It is thus expressed: "for that the defendants are improperly charged in the account with a claim against Elizabeth Nesbett, for which a suit is now pending against her, in which she seeks to get rid of the claim or to reduce it by sets-off." The facts in relation to this charge, so far as we can gather them from the report, are, that the executors were charged in the account with the amount of articles sold to Elizabeth Nesbett, amounting to about $1200, not yet collected, but for which a suit has been brought, which at the time of the report was still pending; and the commissioner reports also, that should Elizabeth Nesbett succeed in reducing the amount claimed, then the executors should be allowed a credit to the extent of that reduction. Now, upon this view of the facts, it would seem that the executors had not yet collected the money, wherewith they were charged in this item; that nothing was shewn from which it could be seen that they ought to have collected it; and until they had collected or ought to have collected it—or unless they had been guilty of some breach of duty in relation to the subject matter of the claim—it was obviously unjust to make them debtors in account therefor. The proper course would have been, in regard to this item, and any others as to which the lia-

bility of the executors depended upon future events, to
(338) reserve them for a further account, which might be prayed for, after a decree *in part* upon the matters of account definitively ascertained.

We see no error in overruling the other exceptions. The first, second, third, eighth, eleventh, and fourteenth could not fitly be regarded as exceptions to the finding of the commissioner, for they assigned no errors therein, but alleged matters proper to be addressed to the discretion of the court upon a motion for further time to take the accounts. The fourth exception, for that the commissioner had not reported what portion of the assets came to the hands of the executors respectively, was properly overruled, because the answer of the executors sets forth a joint receipt and a joint administration of the assets. The fifth was properly overruled as an exception, because the matter therein alleged, that a necessary party had not been brought before the court, though valid as an objection upon the hearing to the rendition of a decree, established no error in the commissioner.

The 7th exception was predicted upon the position taken in the answers, that under a proper construction of the will, the surplus of the testator's estate was divisible *per stirpes* and not *per capita*. This position cannot be maintained. The cases of *Ward* v. *Stowe*, 2 Dev. Eq. Ca., 509, and *Bryant Adm'r Britt* v. *Scott*, 1 Dev. and Bat. Eq. Ca., 155, are decisive upon this point. The 9th exception alleged that a suit had been brought by Robert Foster to rescind a sale made by the executors and to recover back the purchase money. Assuming this allegation to be true, there seems no sufficient reason why the possibility of such a recovery should prevent the proceeds in the mean time from being regarded as assets in their hands. It would be otherwise if it appeared that the proceeds had not yet been received: Then *prima facie* the executors were not chargeable with them. The 10th and 16th were too vague and indefinite to present any point to the judgment of the court. The existence of the claim alleged in the 12th exception does not appear to have been in any manner shewn to the commissioner or the court, and the pleadings did not bring it forward for consideration. The commissioner, therefore, was not guilty of
(339) any error in omitting all mention thereof. The 13th was properly overruled because the executors could not rightfully claim a credit for an expenditure, which they had not made, and which they might never make. The 15th exception, because the commissions allowed were not sufficient, appears to

us to have been altogether unfounded. It must be an extraordinary case which could justify the very liberal allowance of commissions for which the executors were credited in the account, within 1 per cent. of the largest rate of commissions which the law permits.

This court is, therefore, of opinion that the order confirming the report of the commissioner is erroneous as to the matter embraced within the sixth exception, and of course that the decree founded upon that report is to that extent erroneous.

But the decree is altogether erroneous in this, that, upon the pleadings, it appears that Ellis Foster has a joint interest with the petitioners in the legacy, for which this petition has been preferred, and the said Ellis Foster hath not been made a party thereto by any process or otherwise, nor is any reason alleged in the pleadings, wherefore he hath not been made a party.

The decree rendered below is therefore reversed *in toto*, and the cause remanded to the Superior Court for further proceedings thereon, as the parties shall be advised and the course of the court permit. The plaintiffs must pay the costs of the appeal.

PER CURIAM. Decree accordingly.

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(340) Den on demise of ABNER HALCOMBE *vs.* JAMES RAY.

1. A deed, absolute on its face, but intended as a mortgage only, is fraudulent and void against creditors and purchasers, and against subsequent as well as prior creditors.
2. Such a deed cannot be rendered valid by any subsequent agreement between the grantor and grantee, that the grantee should have all the interest of the grantor in the premises, and by the actual payment by the grantee, in pursuance of such agreement, of the full value of the land to the grantor's creditors.
3. Nor even where the deed is re-delivered subsequently to and in pursuance of such agreement. Having taken effect, as between the parties, on the first delivery, the deed could not be surrendered to be re-delivered.
4. The cases of *Gregory* v. *Perkins*, 4 Dev., 50, and *Martin* v. *Cowles*, 1 Dev. and Bat., 29, cited and approved.

This was an action of Ejectment, tried at the Fall Term, 1840, of Yancy Superior Court, before his Honor Judge BAILEY. The jury found a verdict for the plaintiff and judgment was rendered thereon, from which the defendant appealed to the Supreme Court.

The facts of the case are stated by the court in delivering their opinion.

Francis for the plaintiff.
Hoke and Saunders for the defendant.

RUFFIN, Chief Justice. Robert P. Tredway purchased the premises in controversy from one Bailey, and took a conveyance in fee, on the 25th of September, 1835; and both of the parties to this suit claim under Tredway. The price he was to give Bailey was $1000; of which $500 was secured by Tredway's own bond, and the other $500 by the bond of Tredway and the defendant, Ray, as his surety. At the time Ray executed the bonds, it was understood between those three persons,
(341) that Ray was to be indemnified from loss by a conveyance of the land as a counter-security; and he and Tredway requested Bailey to make his conveyance directly to Ray, instead of Tredway. But Bailey declined doing so, and Ray, who was father-in-law of Tredway, then became surety, upon an agreement of Tredway to secure him by a mortgage of the land.

On the 28th of September, 1835, Ray took from Tredway conveyances for the lands purchased from Bailey, and also for all his other property, real and personal; all which were absolute and unconditional in their terms, but were really given upon an agreement between the parties, that they should operate as a counter-security to Ray, in the manner above mentioned. In March, 1836, Halcombe, the lessor of the plaintiff, and one Love and other creditors, brought actions against Tredway; and he, in April following, having remained in possession of all the property he had conveyed to Ray, and being still indebted to those persons, and also to Bailey for the land and to others, made a contract to sell to Ray all his remaining interest or right of redemption in the land, and removed from the State. All those debts existed at or before the execution of the deed to Ray of the 28th of September, 1835, unless it might be the debt to the lessor of the plaintiff; and it did not appear whether that was contracted before or after that day. The land is of the value of $1000; and after Tredway left this State, the defendant paid $400, in part of the debt to Bailey, for which he was surety; and there remains due thereon $100, for which he is still liable. He also paid the further sum of $500 to Love and other creditors of Tredway, and assumed to pay $200 more for him. In June, 1836, judgment was recovered in the action brought by Halcombe against Tredway, and under a *fieri facias* thereon the land was sold and purchased by the lessor of the plaintiff.

On the trial, the counsel for the defendant moved the court to

instruct the jury that the conveyance to the defendant was good, and vested the land in the defendant, although it was absolute in form, and although it was intended it should only be a security in the nature of a mortgage, to indemnify the
(342) defendant from loss as Tredway's security, provided the deed, in the opinion of the jury, was executed with the *bona fide* purpose that it should be used or operate only as such counter-security, and with no actual intent to deceive and hinder Tredway's creditors. And the counsel moved for the further instruction, that, if the foregoing proposition were not true in respect to Tredway's creditors, whose debts existed at the time he conveyed to Ray, yet it was, at least, true in respect to the debt to the lessor of the plaintiff, who did not shew when he became a creditor. And the counsel for the defendant moved the court further to instruct the jury that the purchase, by the defendant in April, 1836, of the remaining or absolute interest of Tredway, confirmed and made effectual the deed of September, 1835, as an absolute conveyance, although intended, at first, only as a mortgage; especially, if the jury should believe there was a re-delivery thereof in April, 1836.

Upon those several points his Honor gave his opinion: that the deed, being absolute, but intended at the time as a mortgage, was void as against Tredway's creditors; and that the lessor of the plaintiff was such a creditor as could avail himself thereof; and that the subsequent purchase by the defendant could not give effect to the prior deed, unless it was upon such purchase, re-delivered; in which case, the title would pass from the re-delivery.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

The first part of the instructions is, doubtless, founded on the case of *Gregory* v. *Perkins*, 4 Dev. Rep., 50, and is supported by that decision. The taking absolute conveyances, where only a mortgage was intended and where the possession remains unchanged, has ever been regarded as a strong badge or circumstance of fraud at common law or under the statute 13 Eliz. But, independent of that consideration, we thought the rule, laid down in *Gregory* v. *Perkins*, the necessary consequence of the recent acts of the General Assembly, denying an operation to mortgages and deeds of trust until they are registered, and declaring them void, as against creditors and purchas-
(343) ers, unless registered within a prescribed time. There may be, in many cases, difficulties in ascertaining, as a

matter of fact, the true nature of the transaction intended by the parties and in coming to the conclusion, whether a mortgage or mere security in the nature of it was designed. But in this case there is no doubt upon that point; as the real character of this transaction is manifest, and, indeed, is admitted in the instruction as prayed. To sustain an absolute deed, thus acknowledged to have been intended by the parties to be only a mortgage, would, in truth, be to defeat the policy of the Legislature and make the acts of 1820 and 1829 a dead letter. But, it is said, the parties may have put their contract into this form ignorantly and, therefore, innocently; and that thereof the jury should enquire. Not so. For the same thing may be said in regard to the omission to register a mortgage, appearing on its face to be a mortgage—that may also arise from want of knowledge and not from a purpose actually deceptive and fraudulent. Yet the effect to a creditor or purchaser is the same: He is deceived, and, therefore, the statute is express and positive, that, at all events, the unregistered mortgage shall be void. By a necessary construction, the law must mean the same thing in regard to an absolute deed, intended to be only a mortgage; since altho' registered, it imparts to creditors and purchasers no more knowledge of the truth and of their rights, than they would derive from a deed, in its terms a mortgage, which the party keeps in his pocket unregistered. If the deed had truly expressed the contract of the parties, the mortgagor's creditors would have a plain legal remedy against his equity of redemption in lands, and in equity against that in chattels; and the Legislature, by the acts under consideration, intended to provide for the creditors such means of knowledge as would enable them to avail themselves promptly and cheaply of those remedies. Our duty is to receive and administer the statutes in a sense, which will advance the remedies and secure to creditors the whole benefit intended for them; and, therefore, we are obliged to hold such a deed void, because it obstructs and baffles the creditor in the pursuit of his debts by those remedies the law intended to afford
(344) him; and, if allowed to stand, the creditor would be in the same condition as if no such law had ever passed.

We also think the lessor of the plaintiff is a creditor within the acts, tho' he may have become so after the execution of the deed to the defendant. His debt certainly arose as early as March 1836; and, therefore, existed before the second contract between Tredway and Ray and while the former had an equity of redemption in the premises. As respects this question, that

second contract makes no difference. If valid it would defeat this creditor, and also all others, tho' their debts existed before September 1835, unless ripened into judgment and execution, so as to create a lien before the final and absolute sale. But supposing the second contract not to be effectual in itself, or in confirmation of the deeds before made, then, we think, the lessor of the plaintiff may impeach the deed upon the ground he does; because if the deed had been a mortgage in terms, he could, under the act of 1812, have sold the equity of redemption existing in the mortgagor at the time he recovered his judgment.

The deed can derive no aid from the subsequent transactions of April, 1836. In the first place, if it had been in fact re-delivered, there are authorities, that the deed is not made good thereby; because it was good between the parties, and, so had taken some effect from the first delivery, and, therefore, could not be surrendered, to be delivered a second time. In the next place, that question ought not to have been left to the jury; for there was no evidence whatever on the point. But no stress is laid upon either of those matters, since the jury has found, that there was not a second delivery. Then, the case stands merely on the second contract and the payments made by the defendant under it; and it has been contended, that the deed, tho' originally fraudulent and void, is rendered valid by this *ex post facto* purchase at a fair price. It is not denied, that conveyances may become good, to some purposes, by matter *ex post facto*. If a father give land to his son, and the latter, being about to marry, settle it on the intended wife and the issue; or if a fraudulent vendee sell to a *bona fide* purchaser, the creditors of the
(345) first grantor are bound, because the wife and the other purchaser are persons protected by the statute. *Martin* v. *Cowles*, 1 Dev. and Bat., 29. But a fraudulent grantee can by no subsequent matter confirm the deed or purge it of its vice, so as to render it effectual as a conveyance to vest a title in himself. He can only become the owner of the property by a new and independent contract and conveyance.

PER CURIAM. Judgment affirmed.

DANIEL SMITH *vs.* MALCOLM MUNROE and ROBERT MUNROE.

1. The county courts have the power to grant administration in this State of the effects of persons, who resided and died in another country.

2. The court of the county in which such deceased person had effects to be administered on or *bona notibilia*, is the proper county to grant the administration.

3. A right to a distributive share of an intestate's estate constitutes such *bona notibilia* as entitles the court to grant administration.

4. Where the next of kin reside abroad, it is in the power and it is the duty of the court to grant administration to the appointee of such next of kin.

Daniel Smith, the plaintiff, applied to the County Court of Cumberland to revoke letters of administration which had been previously granted to the defendants on the estate of Lauchlin McKay, the plaintiff claiming the administration himself as next of kin. The County Court refused the motion, and the plaintiff appealed to the Superior Court of Cumberland. On the hearing of the case at Spring Term, 1839, of this court, before his Honor Judge PEARSON, the judgment of the County Court was affirmed, and the plaintiff appealed to the Supreme Court.

(346) The facts will be found in the opinion delivered by the Supreme Court.

Henry and W. H. Haywood for plaintiff.
Saunders for defendant.

RUFFIN, Chief Justice. Margaret McKay died intestate in Cumberland County, and Daniel Smith, of the same county, obtained letters of administration of her estate, which consisted of sundry articles of personal property, including some slaves, as claimed by her next of kin. She left several children surviving her; among whom was Lauchlin McKay, who resided in the State of Mississippi and died there intestate, leaving a widow and children then and now residing also in that State. The widow, by letter of attorney, appointed M. Munroe and R. Munroe her attornies to take administration in this State of her late husband's effects; and under that authority they applied to the County Court of Cumberland for administration of the goods of Laughlin McKay, deceased; and the same was granted accordingly. Neither of the Munroes is of kin to the intestate Lauchlin; but Daniel Smith is of kin to him, and also married the sister of said Lauchlin, and she is the nearest of kin of the intestate resident in North Carolina.

Upon this state of facts, Daniel Smith applied to the County Court of Cumberland to revoke the grant of administration to the Munroes, and also to grant the administration to himself, as one of the next of kin of the party deceased, or in right of his said wife, the sister and nearest of kin in this State of the said Lauchlin deceased. The County Court refused each motion, and Smith appealed to the Superior Court, which affirmed the sentence before pronounced, but allowed an appeal to this court.

In the Superior Court several points were made and decided, on which the case comes in review before us. They are,

First: Whether the County Court of Cumberland could grant to any person administration of the goods of Lauchlin McKay, inasmuch as he did not die in that county, but his residence and death were in another State. Upon this the opinion of the court was in the affirmative.

(347) *Secondly:* whether a claim or right to a distributive share as next of kin to an intestate, dying possessed of goods in that county, and whose administrator there resides, may be accounted *bona notabilia* in that county. Upon this the court was of opinion that such a claim in Cumberland was sufficient to give the court of that county jurisdiction.

Thirdly: Had the court power to grant administration to the widow's appointees?

Fourthly: Had not Smith, upon the whole, the preferable right to administer under the statutes of this State?

Upon the two last points the court held that the County Court might well prefer to grant the letters of administration to the attorneys of the widow rather than to Smith, a relation against whom there was a claim in favor of the party deceased.

The opinion of this court accords with that of the Superior Court, that the sentence of the County Court should be affirmed.

The first point is not made in the form, probably, to express the true meaning of the parties; for we suppose the intention was, not to raise the question, whether the court of Cumberland, as contradistinguished from the other courts of the State, could grant administration of the goods of a party, who did not die in this State, but resided and died abroad; but whether, in such a case, administration could be granted by any court of North Carolina. The propriety of the grant being made in that particular county depends upon the solution of the second question rather than on the first. Upon the general question, whether the courts of this State may grant administration of the goods of a person living and dying in another State, we entertain no doubt. Administration in another country will not enable the administrator to sue here. *Butt's Admr.* v. *Price,* Conf. Rep., 68. Unless, therefore, we grant administration, the estate here cannot be administered, either for the benefit of the creditors here or those abroad, or for the benefit of those persons who are entitled to the surplus according to the law of the domicil of the party deceased. No country, having a just regard for its

own character or the comity due to other countries, can
(348) refuse her authority to collect and apply the goods within her jurisdiction in the proper course of administration. In England, administration of the goods of a foreigner has always been granted, no matter where the party resided or died. The argument to the contrary with us rests, therefore, entirely upon the legislation of this State. The act "concerning executors and administrators," Rev. Stat., c. 46, s. 1, provides that "letters testamentary and letters of administration shall be granted in the court of the county where the testator or intestate had his usual residence at the time of his death, or, where the deceased had fixed places of residence in more than one county, then in either." Upon this enactment it is contended, that the County Court hath but a special and limited jurisdiction, to grant administration in the particular case, in which the deceased had a residence within that county, and in that case alone, and, therefore, that the grant in any other case is void. If this were so, this application by Smith would be rejected, since it is in vain to revoke a grant which in itself is a nullity. *Collins* v. *Turner*, No. Car. T. Rep., 105. But we do not adopt that construction of the statute. The section is composed of the digested provisions of the acts of 1777, c. 115, s. 57, and of 1789, c. 308, s. 1, and to arrive at its true meaning, is to be understood as those acts themselves would be. By the act of 1715, c. 10, s. 3, letters of administration issued only out of the Secretary's office, under the signature of the Governor and the seal of the Colony. Of course, the authority to issue letters from that source extended to every case, in which there could be administration, without regard to the residence of the deceased in any particular county. After the revolution, the jurisdiction was transferred to the County Courts by the act of 1777, by which it was enacted "that the Courts of Pleas and Quarter Sessions shall and may, within their respective counties, take probate of wills, and the said courts shall make orders for issuing letters testamentary and letters of administration to be signed and issued by the Clerk."

This act does not make the residence of the deceased the criterion for ascertaining the particular court which should have
(349) the jurisdiction of granting administration. The terms "within their respective counties" could not have the effect of confining the jurisdiction to the case of the death of the party within the county; but must have been understood as referring to *bona notabilia*, the place of the residence or of the death of the party within the county, or to any other

fact, which, at common law, imparted or withheld jurisdiction, as between the different courts of probate. Residence is not mentioned in the act, and cannot therefore, be interpolated, any more than any other circumstance, as that which determines the jurisdiction. Those words "within their respective counties" do not, therefore, limit in any degree, or define the cases, in which administration is to be granted by some court in this State, but are intended merely to provide that, as between courts of the several counties, the jurisdiction of each should depend upon the same considerations that determined the jurisdiction of the several courts of ordinary at common law; namely, the residence or death of the party, or his effects being within the territorial jurisdiction of the particular court. It had doubtless been found, that the general letters of administration, issued under the Colonial seal and embracing all the goods in the Colony, were extremely convenient; inasmuch as there could arise no dispute as to their validity, in respect of the extent of the jurisdiction from which they emanated, and the creditors knew in whose hands to seek the assets. It is not probable the Legislature intended to abrogate that principle; especially as no court was constituted, in the nature of the Provincial Ecclesiastical Courts of England, to grant administration, where there were effects in different counties; and as that was the known policy, it was probably the usage for each court that could grant administration at all, to grant it fully, so as to extend to all the effects. It would seem, from the preamble of the act of 1789, c. 308, that something of the kind did occur; for that recites that "the method of proceeding had not been defined with sufficient precision in the act of 1777, whereby great irregularities had crept into practice, and complaints had been made of precipitate and injurious decisions:" whence it may be inferred, for example, that if a person died in a particular county, having effects in that and
(350) another county, in practice a full administration was granted in both, which must have often occasioned surprise and inconveniences. To remedy those irregularities and inconveniences, and by way of amendment to the act of 1777, it was enacted "that all wills shall be proved and administrations granted, in the court of the county where the testator or intestate had his usual residence at the time of his death, or, in case he had fixed places of residence in more than one county, in either of said counties." Upon this enactment, we cannot put the construction contended for on the part of the appellant. The act of 1789, is not a grant of the jurisdiction to appoint

administrators. That had been conferred generally by the act of 1777 on the County Courts; and from the want of precision in the terms, conflicting jurisdictions were exercised by different courts, whence it became necessary to settle that conflict in those cases in which it most commonly occurred. Hence the jurisdiction is given to the court of the county, or of one of the counties in which the party had a fixed domicil at his death. That was the single purpose of that section of the act. It embraces in its provisions but the case of the death of a person resident in one or more counties of this State, and in such case confers the jurisdiction upon the court of any of those counties. The case of the death of a person having no usual place of residence, or none in this State, is altogether out of this last act, and depends upon the previous one of 1777, and the general principles of law existing anterior to the enactment of either of the statutes under consideration. Consequently there may be an administration in this State of the goods of a person who was the citizen of another State in which he died.

This opinion is not in conflict with that of *Collins* v. *Turner;* for there Blackburn, the party deceased, had his domicil in Chowan, and Collins, his debtor, resided there. There was consequently neither a residence nor effects in Bertie, where Turner took administration.

In the discussion of the preceding point, several matters were necessarily considered, that go far to determine the most material part of the second question. If there be *bona*
(351) *notabilia* in Cumberland, we think that is a proper county in which to take the administration. It does not appear that there are any effects in any other part of this State; and, therefore, we need not now say to what extent the administration ought to be granted, or will be valid. We think there should be *bona notabilia* in the county, because the canon law, as administered in peculiar jurisdictions in England, was the law of that country upon this subject; and, like other parts of her unwritten law, was brought here by our ancestors. But the practice has not been in this State for each court to grant administration of the effects within its county; and, from the settled usage in that respect, and the convenience to administrators, next of kin, debtors and creditors, we are inclined to hold that, although special administrations may be granted, yet the court of any county, in which there are *bona notabilia*, may grant administration of all the effects of the deceased within the State. That the right to a distributive share of an intestate's

estate is to be accounted *bona notabilia* we have no doubt. Goods in possession and debts, however desperate, are so considered, and even a claim, on account of purchase money, of one who had sold an estate, but had made an assignment for the benefit of creditors, was held to be of this character by SIR JOHN NICHOLL, *Coates* v. *Brown*, 1 Add., 345.

The power and duty of the court, when the next of kin reside abroad, to grant administration to the appointee of the next of kin, was held in this State in the early case of *Ritchie* v. *McAuslin*, 1 Hay., 220; and we believe that decision has guided the courts in subsequent cases. We do not find much upon the point in elementary works, nor in the decisions of the Ecclesiastical courts; yet we see enough stated incidentally to satisfy us that it is the common practice in those courts, There are several cases, in which the persons entitled were foreign public characters, and administration was granted to those authorized by them to take it, and for the benefit of the principals. In *Farrington* v. *Clerk*, 3 Doug., , it appears the party had taken administration *as the attorney of the next of kin*. And in *Anstruther* v. *Chalmer*, 2 Simons, 1, the letters were to
(352) "J. C. & A. F. as the attorneys of E. Campbell, the sister and only next of kin of C. A., for the use and benefit of the said E. Campbell." Upon an enquiry at the instance of the Vice Chancellor as to the effect of those words "for the use and benefit," the Deputy Register of the Prerogative Court certified, that the words were invariably used "where the grant was to persons under a power of attorney from the party entitled to the representation;" but although they are "for the use and benefit" of that person, they do not exclude the claim of any other person to share in the personal estate. What effect, then, they can have, it is not easy to see; nor is it needful we should consider. The passage is cited by us only to shew that there is "an invariable usage" upon this point, in conformity to which, in substance, has been the course of our courts.

Having arrived at the foregoing conclusions upon the preceding points, it follows that neither the appellant Smith nor his wife, if she had applied, could be preferred before the deceased's widow, although the latter resides out of the State. 1 William's Ex'r, 257, 263. It is to be presumed, nothing to the contrary appearing, that by the law of Mississippi a widow is entitled to a share of her intestate husband's personal estate; and, therefore, may ask for the administration here for herself, and, by consequence, for her attorneys.

PER CURIAM. 278 Judgment below affirmed.

(353) JAMES W. COTTEN *vs.* WILLIAM R. CLARK and JOHN H. DAWSON.

A *certiorari* will not be granted, where an appeal has not been brought up, through the inattention or forgetfulness of the clerk of the court, whom the appellant had constituted his agent to send up the appeal.

Badger moved for a *certiorari* in behalf of the plaintiff to bring up the record in this case, in which an appeal had been taken by the plaintiff from the judgment of the Superior Court of Halifax, but which appeal had not been filed in time. The motion was founded on the following affidavit, which was regularly sworn to:

Robert L. Whitaker, Clerk of the Superior Court of Halifax, maketh oath that, soon after the appeal to the Supreme Court was taken in the above case, he was requested by the counsel of the applicant to prepare the transcript, and transmit it to the Supreme Court; that he promised to do so, and was aided by the counsel in making up the transcript; that the transcript was made up in abundant time to be filed in the appellate court. This affiant further maketh oath that he has been clerk as many as four years of the Superior Court of Halifax, and hath been invariably in the habit of transmitting the transcripts of appeal cases to the Supreme Court, and it is the understanding between him and the appellants that he is to do this himself, without any agency on their part. This affiant hath always heretofore done so, and hath uniformly availed himself of the opportunity of sending them by his Honor Judge DANIEL, who resides in the town of Halifax. By mistake, this affiant took up the impression that the last Monday in December was a week later than it actually was; in consequence of which, Judge DANIEL left without the transcript, and as soon as the mistake was discovered this affiant mailed the papers for Raleigh, having paid the postage.

Sworn to &c. ROB. L. WHITAKER.

PER CURIAM. Motion denied.

(354) STATE *vs.* MADISON JOHNSON.

1. When a deliberate purpose to kill or to do great bodily harm is ascertained, and there is a consequent unlawful act of killing, the provocation, whatever it may be, which immediately precedes the act, is to be thrown out of the case, and goes for nothing, unless it can be shewn that this purpose was abandoned before the act was done.

2. There is no such thing in law as a killing with malice, and also upon the *furor brevis* of passion; and provocation furnishes no extenuation, unless

it produces passion. Malice excludes passion. Passion presupposes the absence of malice. In law they cannot co-exist.

3. When the existence of deliberate malice in the slayer is once ascertained, its continuance, down to the perpetration of the meditated act, must be presumed, until there is evidence to repel it. There must be some evidence to shew that the wicked purpose had been abandoned.

4. It is the duty of the Judge, who presides at the trial of any cause, whether civil or criminal, to correct any misrepresentation of law made to the jury, although admitted to be law by the parties or their counsel.

5. Provocation never disproves malice; it only removes the *presumption* of malice, which the law raises without proof. A malicious killing is murder, however gross the provocation.

This was an indictment against the prisoner for the murder of Henry Beasley. The prisoner having pleaded not guilty, the issue was tried at the Fall Term, 1840, of Wake Superior Court of Law, before his Honor Judge HALL, when the jury found the prisoner guilty of the felony and murder in manner and form as charged in the bill of indictment. A motion for a new trial was made by the prisoner's counsel, on the ground that the jury were misdirected by the court. This motion having been overruled, and judgment of death having been pronounced by the court, the prisoner appealed to the Supreme Court.

The following is the case submitted to this court:

On the trial of the issue, one Ragan, a witness for the prosecution, deposed, that one night in November, 1839, he was at a shop in Raleigh kept by himself and one Aaron Johnson, the father of the prisoner. The prisoner, the deceased, one O'Brien and the witness were there. A quarrel arose between O'Brien and the prisoner, who struck O'Brien two blows. They were separated and the prisoner went out. When witness went to close the door, the prisoner came to the door. Beasley (the deceased) asked the prisoner what was the use of having
(355) such a fuss. Prisoner asked him if he took it up. He said he did not. Prisoner said he was not afraid of him, to which deceased replied by affirming that he was not afraid of prisoner. And thereupon prisoner immediately raised his arm, and a pistol fired. Prisoner immediately went away; the deceased also went out, exclaiming "I am a dead man."

The death of the deceased from a wound then inflicted by the discharge of the prisoner's pistol was fully proved and was admitted.

The prisoner examined one Pollard, who deposed that, on the night mentioned by Ragan, he went to the shop to buy some fish. The deceased, who was acting as an assistant or clerk in the shop, went with the witness into a back room of the shop to get the

fish. When witness came in O'Brien and prisoner were quarrelling, and when witness and the deceased returned into the shop from the back room, they were still quarrelling; when the deceased told prisoner to behave himself. Prisoner asked the deceased if he took it up. Deceased said he did, and a smart quarrel ensued between them. After some time, prisoner said he would go to bed. Deceased said he should not. Prisoner said it was hard if he could not go to bed in his father's house, and took a candle and went into the back room, and was in the act of ascending the stairs, which led to a bed room above, when the deceased went up to prisoner, seized him by the collar, pulled him through the back room and shop to the front door, and pushed him out, kicking him at the same time. As this was done, witness (desirous of getting away from the fuss) got out of the shop and hastened away, and soon after heard the report of a pistol.

Several witnesses deposed that, within a few minutes after the pistol was fired, they heard the prisoner say that he had shot the deceased, that if it was to do again he would do the same thing, and if any person touched him he would shoot him likewise; and he hoped the deceased would die and go to hell.

Polly Mangum, examined for the State, deposed that, on the same day, the prisoner was at her house at dinner; said
(356) he had bought powder and shot, and intended to kill a man that night before the bell rung, and at the same time shewed a pistol. She said to him "Madison, why are you going to do so?" he replied "aunt Polly is it not a shame that I should have to work all day in the hot sun?" She then asked him whom he intended to kill; to which he replied "I name no names and value no law." At the time of this conversation, the prisoner had been drinking but was in his senses.

This was all the material evidence, except to support and oppose the credit of the witnesses, Ragan and Pollard.

The Attorney General admitted that if the testimony of Pollard was true, the prisoner was guilty of but manslaughter, but he insisted that Pollard ought to be discredited, and Ragan should be believed, and that upon his evidence the prisoner was guilty of murder.

The prisoner's counsel commenced his address to the jury, by admitting that, if Ragan's evidence was true, the prisoner was guilty of murder; and stated to the jury that the whole case therefore depended on the question, whether Ragan or Pollard should be credited, as upon the case as stated by the latter, it was

but manslaughter. The presiding Judge here interrupted the counsel, and said he should instruct the jury, if they were satisfied that the prisoner had previous malice against the deceased, and went to the shop on the evening of the homicide, with an intent to provoke a quarrel and revenge himself, he was guilty of murder, although Pollard's statement should be true.

The prisoner's counsel insisted that, in order to make this case one of murder, supposing Pollard's statement to be true, it must appear that the prisoner sought the provocation he received, or that he did not act under its influence; that his being at enmity with the deceased did not make it necessary that he should take more from him than from a stranger or a friend; that the provocation proved by Pollard would reduce the crime to manslaughter, if committed on a friend or stranger, and would have the like effect, when the person killed was an enemy, if he acted under the provocation; that, if the prisoner went to the shop to bring on a quarrel as a pretence for killing, still he would
(357) not be guilty of murder, if he did not bring on the quarrel, but acted in truth upon the provocation then received, and would not have acted but from the provocation. And the prisoner's counsel further insisted that the provocation proved by Pollard was a sufficient and adequate motive for the prisoner's conduct, to which it was to be referred, unless by some proper evidence it was shewn that he did not act from that motive, but from something deemed malice, or proof of malice. And the counsel contended that, in this case, there was no evidence proper to be left to the jury, that the deceased was the object of the prisoner's threat, supposing Pollard's statement true, nor that he had malice or ill will against him, nor that he sought or brought on the quarrel, nor that he acted but from the provocation proved by Pollard.

The Judge, in leaving the case to the jury, after directing them that on Ragan's evidence, the prisoner would be guilty of murder, and that the provocation stated by Pollard was sufficient in law to reduce the killing to manslaughter, instructed them nevertheless, that, although they should believe Pollard's evidence to be true, yet if, connecting the testimony of Polly Mangum with the other evidence in the cause, they could collect the fact that the deceased was the object of the threat deposed to her, and that the prisoner went to the shop with the intention to provoke a quarrel with the deceased, in order to gratify his avowed vengeance, then the killing was murder, notwithstanding the facts proved by Pollard.

Attorney General for the State.
Badger for the prisoner.

The opinion of the majority of the court was delivered by GASTON, Judge. After an anxious consideration of this case, the court is unable to find any grounds, on which to pronounce the judgment, rendered against the prisoner, erroneous.

The only error alleged is, because of misdirection of the presiding Judge in his instructions to the jury. It has not been questioned, nor can it be questioned, but that it is the (358) duty of a Judge, who presides at the trial of a cause, whether civil or criminal, to correct every misrepresentation of law made to the jury, although admitted to be law by the parties or their counsel. He does not preside merely as a moderator, to enforce order and decorum in a discussion addressed to a body, with whose deliberations he has no concern, and over whose judgment he is to exercise no influence; but he is an integral part of that mixed tribunal, which is to pass upon the issue, and, while he is forbidden to give to the jury "an opinion whether any fact is sufficiently proven," he is bound to declare and expound to them the law arising upon those facts. Rev. Stat., c. 31, s. 136.

The alleged error is supposed to be, partly in the instructions actually given, and partly in declining to adopt, as a modification of those instructions, certain positions, for which the prisoner's counsel contended on the trial.

The instruction given, to which objection has been taken, is that part of his Honor's charge, wherein, after stating that the provocation, testified to by Pollard, was sufficient in law to reduce the killing to manslaughter, he added, "that, nevertheless, if, connecting the testimony of Polly Mangum with all the other evidence in the cause, they could collect the fact, that the deceased was the object of the threat deposed to by her, and that the prisoner went to the shop (where the homicide was committed) with the intention to provoke a quarrel with the deceased, in order to gratify his avowed vengeance, then the killing was murder, notwithstanding the facts proved by Pollard." In support of this objection, it has been argued that a jury cannot collect any fact from evidence, unless such evidence will rationally authorise the inference of the fact, that it is error in law to leave it to them to collect a fact, of which no testimony has been given, or none but of a vague and plainly insufficient character—and that, in the case under consideration, there was no testimony to warrant a finding that the denunciation of the prisoner was directed to

the deceased; and, if possible, yet less that he went to the shop with intent to bring on a quarrel to gratify his avowed
(359) vengeance. To us it seems that there was evidence fully warranting the jury in inferring *the whole fact*, the existence or non-existence of which was left to their judgment. It was not a vague threat, which the prisoner uttered. He avowed his determination to kill *an individual*, whom, however, he refused to name, and to kill him that night; and he exhibited the instrument, which he had prepared to carry this purpose into execution; and on that night, with that instrument of death concealed, he goes to the shop of which the deceased has the charge, gets into a quarrel with him, and, at the time and in the manner previously declared, unlawfully kills him. Upon this, the inference that the deceased was *the person* whom he had previously resolved to kill, becomes irresistible, until there be some facts to repel it. An act was done precisely of the kind which, but a few hours before, he had resolved to do, and prepared the means to execute; and it was done at the time determined on with the means prepared; and the conclusion *must be* that this was the act so designed, unless there be some indications that a different act of the same kind was contemplated. What was the evidence to repel this conclusion? No more than this: that, immediately before the deed was committed, he received from the deceased such a provocation as would have been sufficient, if there had been no malice, to excite high passion. Admit that this fact had some tendency to weaken the inference, to render it somewhat less conclusive, it, nevertheless, left the question of fact, who was the object of his vengeance, one fit for the determination of the jury. It is to be remembered that provocation never disproves malice; it only removes the *presumption* of malice, which the law raises without proof. A malicious killing is murder, however gross the provocation. But it is argued that, as the act of killing in this case followed immediately after provocation, the legal presumption from the act is that it was committed without malice, and therefore it cannot be regarded as evidence at all to establish malice. The answer is, that the act of killing was not relied on *as evidence of malice*. There was proof *aliunde*, of malice, of a fixed determination to kill. The act of killing, like any other act, corresponding in its circumstances with a
(360) previously ascertained purpose, is evidence, because of this conformity, to designate the object of the intended action, and therefore, though not proof of malice, it may point out the *direction* of ascertained malice. If in a crowd, I tread on a man's

toes, it may well be presumed that the act was accidental; but if it appear that I went into the crowd with the purpose to render that insult to some person, then certainly the act would be evidence to point out the individual whom it was my purpose to insult. In forming a judgment upon the question, how far the fact of provocation weakened the inference that the deceased was the object of the avowed vengeance of the prisoner, there were other circumstances in the case proper to be taken into consideration. It appeared that the deceased had been employed to keep a shop in Raleigh, belonging in part to the father of the prisoner. The only intimation, previously given, of the unnamed object of his enmity is to be found in the exclamation, "is it not a shame that I should have to work all day in the hot sun?" That night, at the shop, when forbidden by the deceased to sleep there, he exclaimed "it is hard that I cannot go to bed in my father's house." And, after the fatal deed was done, instead of expressing sorrow for a rash act, committed in the heat of passion, he uttered a horrid wish and imprecation, indicative of a deep-rooted hatred against the deceased, These circumstances, connected with the fact that, on the part of the prisoner, nothing was shewn, tending in the slightest degree to designate *any other object of his vengeance*, seem to point out the deceased as the person, who, supplanting him in his father's shop, being placed in an easy situation, while he was obliged to toil "all day in the hot sun," was regarded by him with the deadly hostility thus avowed, executed and unrepented of.

But admitting that the deceased was the object of the prisoner's vengeance, it is denied that there was evidence to warrant a finding that the prisoner went to the shop with intent to provoke a quarrel and gratify his vengeance. For reasons which will hereafter be assigned, we hold that the charge would have been perfectly correct, had it omitted the inquiry as to (361) an intent to provoke a quarrel, but had left the question of murder to depend solely on the fact, whether he went to the shop with the intent to kill the deceased. But we are entirely satisfied that the circumstances were relevant and fit to be considered, if the enquiry were material, upon the question of intent to provoke a quarrel. Let us advert for a moment to the most material of those circumstances. The prisoner has formed a purpose of most deadly vengeance against the deceased, and prepared the means to execute it. With these means concealed, he goes to the place where the deceased is ordinarily to be found. The first act he is engaged in, after arriving there, is a

quarrel with a third person. This quarrel the deceased had a right to suppress, and does suppress. But the prisoner treats this conduct as the taking of a part in the quarrel against him. The next act is an attempt to take possession of the bed-room, connected with the shop. The case does not state that this was the bed-room of the deceased, and, however probable the presumption that such was the fact, we do not feel ourselves authorized to assume it. But it is not pretended it was the bed-room of the prisoner; it is not shewn that he had ever occupied it, or had any right to occupy it; and indeed the only pretence of right set up by him was, that his father was one of the owners of the shop. Unquestionably the deceased, who represented the owners of the shop and was clothed with their rights, was fully justified in forbiding this assumption of dominion there, and the perseverance in such assumption was a rude and insulting act. If the deceased, upon this, had done no more than turn him out of doors, the deceased would have been wholly blameless in the transaction. But according to the testimony of Pollard, (which for the purposes of the present enquiry must be presumed to be true,) in turning him out of doors, he kicked the prisoner and was instantaneously shot. Now, it is not for us, nor was it for the Judge below, *to draw the conclusion of fact*, that the prisoner did go to the shop, with the intent to bring on a quarrel and execute the purpose of death, which he had formed against the deceased; but if the intentions of men are to be ascertained by their acts, these acts of the prisoner were fit for the con-
(362) sideration of the jury, to enable them to judge what was his intent. He had resolved to kill; he went prepared to kill; he brought on a quarrel with the object of his vengeance, and in that quarrel did kill him. Can it be questioned that it is a proper enquiry, did he intend what happened?

We have said that the enquiry, whether the prisoner intended to bring on a quarrel, was not a material one for determining on the character of his crime. We take the principle to be clear, that when a deliberate purpose to kill, or to do great bodily harm, is ascertained, and there is a consequent unlawful act of killing, the provocation, whatever it may be, which precedes the act, is to be thrown out of the case and goes for nothing, unless it can be shewn that this purpose was abandoned before the act was done. There can be no such thing in law as a killing with malice, and also upon the *furor brevis* of passion; and provocation furnishes no extenuation, unless it produces passion. Malice excludes passion. Passion presupposes the absence of malice.

In law they cannot co-exist. Murder is the killing with malice aforethought. If there be killing, and malice aforethought be shewn, both of the constituents of the crime are established, and the act is murder. Certainly, however, it must be admitted that the most determined purpose to kill may be repented of, and malice, however deeply settled, may be abandoned. But there must be something to shew that this has been done, before it is presumed. There is a *locus*, or rather a *tempus penitentiæ* allowed, but to avail anything it must be employed for repentance, and repentance of a criminal purpose is not *presumed*, if the act be done, which that purpose contemplated. It is not therefore the legal presumption, where a provocation intervenes between the expression of malice and the act of killing, that the slaying was upon passion and not upon malice. The authorities relied upon to establish this position, when fairly interpreted, lay down the opposite doctrine, that the presumption in such cases is, unless there be proof to the contrary, that the killing was upon malice and not upon passion. It is admitted that the passage produced from Mr. East, a very respectable compiler of the criminal law, taken *per se*, does favor the view pressed by the
(363) prisoner's counsel. His language is, "But where fresh provocation intervenes between preconceived malice and the death, it ought clearly to appear that the killing was upon the antecedent malice; which may be difficult in some cases to shew satisfactorily, if the new provocation were a grievous one. In such cases, says Hawkins, it shall not be presumed that they fought on the old grudge, unless it appear by the whole circumstances of the fact." 1 East, c. 5, s. 12. It is to be remarked, however, in the first place, that this passage is the concluding part of a section, wherein he has been considering how far a provocation received may rebut an implication of malice; and, after laying down the proposition that a provocation, immediately preceding the act, will rebut that implication, "but that it will be no answer in alleviation to express malice proven," he proceeds to state that "therefore, if, upon a provocation received, one party deliberately and advisedly denounce vengeance against the other, and afterwards carry his design into execution, he will be guilty of murder, although the death happened so recently after the provocation, as that the law might, apart from such evidence of express malice, have imputed the act to unadvised passion:" and then follow, as a qualification or exception, the words first quoted. Taking, therefore, the whole section, its meaning is this: provocation will not extenuate a killing to

manslaughter, although the act speedily follows upon the provocation, and before the blood, if raised to the boiling point of passion, has time to cool, if, from the advised and deliberate expression of malice it can be collected that the blood *was not* thus heated by that provocation: but if no act of killing *then* take place, and an additional provocation be received, and *thereupon* the person so provoked slay his adversary, it is a fair presumption, unless the circumstances of the fact shew the contrary, that *this* superadded provocation did produce such highly excited passion, and the act of slaying proceeded from this passion. Thus understood, it does not conflict with the views we have taken. But Mr. East, in this passage refers to Hale and Hawkins, who are justly regarded, not as respectable compilers, but as standard authorities; and what is their language? Mr.
(364) East refers to Hawkins, Book 1, ch. 13, sec. 29, 30 (page 97.) Hawkins' words are, "if two happen to fall out upon a sudden and presently agree to fight, and each of them fetch a weapon, and then one kills the other, he is guilty of manslaughter only, because he did it in the heat of blood. And such an indulgence is shewn to the frailties of human nature, that where two persons, who have formerly fought on malice, *are afterwards to all appearance reconciled,* and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge, unless it appear by the whole circumstances of the fact." Mr. East refers also to 1 Hale's Pleas of the Crown, 452. The entire passage in Hale is this: "If there be an old quarrel between A. and B. and *they are reconciled again,* and then upon a new and sudden falling out A. kills B., this is not murder; but if upon circumstances it appears that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the force of the old malice, it is murder." Here we have the true doctrine. The act shall be attributed to passion produced by provocation, and not the old grudge, *if it appear that the old grudge has ceased.* One of the cases put by Hale on the next page is, it would seem, decisive of this point. "If A. challenge B. to fight; B. declines the challenge, but lets A. know that he will not be beaten, but will defend himself; if B., going about his occasion, wears his sword, is assaulted by A. and killed, this is murder in A.; but if B. had killed A. upon that assault, it had been *se defendendo,* if he could not otherwise escape; or bare homicide, if he could escape and did not. But if B. had only made this a disguise to secure himself from the danger of the law, and purposely went to the place, where probably he

might meet A., and then they fight and he kills A., then it had been murder in B.; but herein circumstances of the fact must guide the jury." If B. had formed no determination to fight, but intended only self-defence, and met A. accidently, then the assault upon him would have excused the act of killing altogether, if necessary to his own safety, or extenuated it to manslaughter, if not required by such necessity. But if in truth, notwithstanding his declaration to the contrary, he had formed the (365) purpose to fight, and went to the place to execute that purpose, such an assault would be no excuse or alleviation, and his crime would be murder; and the enquiry for the jury is, from the circumstances, was it his purpose to fight, and did he go with that purpose? Such is regarded settled law in the courts of England at this day, where, in consequence of the numerous cases which call for the exercise of great legal discrimination, precision in the rule on this subject may justly be expected. In the late case of the *Queen* v. *Kirkham*, reported 8 Car. & Pay., 115 (34 E. C. L. R., 318,) where a father stood indicted for the murder of his son, it appeared in evidence that the act of killing was preceded by such an immediate act of provocation, as would extenuate the crime to manslaughter, unless malice was shewn. The crime was committed on Saturday, and testimony was given of threats to kill the deceased, uttered by the prisoner on the preceding Monday and Wednesday. The jury was instructed that the question of manslaughter or murder depended upon *the fact*, whether these threats were the mere ebullitions of momentary anger, or the expressions of a deliberate purpose; "so that if they believed that on the Monday or Wednesday before, the prisoner used the threats deliberately, *then* all the quarrelling and wrestling might be dismissed from their consideration."

In the observations made upon the objections to the instruction given, we have unavoidably anticipated much that is applicable to the other objection, because of instruction not given. It will be sufficient for us now to remark, in relation to this objection, that provocation, *as such*, is not an extenuation of the act of killing, although passion, consequent upon provocation, may extenuate; that the true question is, whether the act be the result of such passion or of malice; and that the relation of good or ill will, prevailing between the parties, is all important in leading to the decision of that question: and that when the existence of deliberate malice in the slayer is once ascertained, its continuance, down to the perpetration of the meditated act, must be

presumed, until there is evidence to repel it. What that evidence should be it is hazardous to define. But there must be *some evidence*, and, without it, the jury cannot rightfully
(366) find, or the court give an instruction implying that they may find, a discontinuance of deliberate malice. If a considerable period of time has elapsed, between the last indications of the wicked purpose and the killing; if convenient opportunities for gratifying vengeance have passed over, and no use was attempted to be made of them; if an apparently amicable intercourse has taken place between the parties in the mean-while; these, and such as these, would be circumstances well worthy of the consideration of the jury, as tending to shew a change of intention. True, it is in the power of Him, in whose hands are the hearts of his creatures, to effect this change in the twinkling of an eye, and He alone can know with certainty whether it hath or hath not been made. But men, fallible men, obliged to judge of human motives, and yet having no means of judging but by external indications, are compelled to pronounce the unlawful deed the consequence of the wicked purpose, unless there be some evidence, which their understandings can discern, that such purpose had been relinquished. In the case before us there is one thing, which we can pronounce with certainty. If the prisoner did go to the place, where he killed the deceased, with intent to kill him; and so the jury have found, and so in our opinion they were warranted to find, there was *no evidence*, however slight, shewing, or tending to shew, that this intention was abandoned, before the act was done. The decision of this court must be certified to the Superior Court of Wake, with directions to proceed to judgment and sentence of death against the prisoner, agreeable thereto, and the laws of this State.

DANIEL, Judge, delivered a dissentient opinion as follows:

The Judge charged the jury that "if they could collect the fact, that the deceased was the object of the threat deposed to by P. Mangum, and that the prisoner went to the shop, with an intention to provoke a quarrel with the deceased, in order to gratify his avowed vengeance, then the killing was murder, notwithstanding the facts proved by Pollard." This part of the charge is particularly objected to by the prisoner's coun-
(367) sel. He says that there was *no* evidence in the case, which tended to shew the court and jury, that the prisoner *sought* a provocation to be given him by the deceased, that he might have a pretext to fire on him as he did, and that the

Judge should have told the jury, that there was *no* evidence in the case to support that position taken by the Attorney General. He contends that the cause or motive, that prompted the fire, should have been distinctly left to be found by the jury, with instructions from the court, that, if the cause was the next immediate provocation given by the deceased, by dragging the prisoner through the rooms and kicking him out of doors, then it was only a case of manslaughter; but if the cause of the fire was upon a former grudge, then it was murder.

One reasonable creature killing another human being, *with malice aforethought*, is the legal definition of murder. But for any assault, made with violence or circumstances of indignity upon a man's person, as by pulling by the nose, if it be resented immediately by the death of the aggressor, and if it appear that the party acted in the heat of blood upon the provocation, this will reduce the crime to manslaughter. 1 East P. C., 233; Kel., 135; 4 Blac., 191. Such a provocation, the law presumes, might, in human frailty, heat the blood to a proportionable degree of resentment, and keep it boiling to the moment of the fact; so that the party may rather be considered as having acted upon a temporary suspension of the reason, than from any deliberate malicious motive. 1 East P. C., 258. In case of a legal provocation, strictly so considered, the heat of blood will extenuate the guilt of the party, acting under its adequate influence, even though he make use of a deadly weapon. 1 East P. C., 258. It is admitted in the case before us, that the provocation given by the deceased, next immediately before the pistol was fired, (as deposed to by Pollard,) would, if true and standing alone, have reduced the killing to manslaughter. It is contended for the State, that the evidence of the witness Mangum and the subsequent killing of Beasley by the prisoner, was strong and sufficient presumptive evidence of *aforethought malice* against the deceased. I admit that it was sufficient evidence to go to
(368) the jury upon that point. But the question still returns, did the prisoner fire by force of the promptings of that *aforethought malice*, or was he moved to fire by the provocation, just then received? Malice aforethought is the result of deliberation; if the prisoner fired, when his blood was boiling by the provocation, when he was under a *brevis furor*, and as it were without reason, the presumption arises that the act was done from the impulse of immediate anger and excitement. If so, it negatives the charge that it was done by the promptings of the aforethought malice. The jury might find a *locus penitentiæ*, or

a *cesser* of the former grudge, and that the killing was the result of the *brevis furor*, which the prisoner was thrown into by the immediate provocation. If A. has malice against B. and intends to murder him, at a time when he can conveniently do it, B., ignorant of the design, but for some illegal cause or other, sets upon A. with such violence, that it becomes absolutely necessary for him to kill B. to save his own life; is this murder in A., because there was proof that sometime before, he had malice against B.? I should suppose not; and the jury, I think, would be left to say that the death blow was given under the immediate and natural impulse of A. to save his own life, and therefore excusable homicide. So likewise, in the case just supposed, if B. assault A. by taking him by the collar, and forcibly drag him through two rooms, and then kick him out of the door in the presence of company, and A. instantly fires a pistol and kills B., are the jury compelled to say this is murder, because of the antecedent grudge? Can they not say, if they believe the truth to be so, that A. was induced to fire, from the immediate anger or *brevis furor*, into which he was thrown from the provocation just before received, and that it was manslaughter? It seems to me that the jury would be at liberty so to find, and that they ought so to find, unless it "clearly appeared" that the prisoner killed under the *former malice*. The case of the *Queen* v. *Kirkham*, 34 Eng. C. L. R., 318, so far from being authority against this position, is a case, as it seems to me, in favor of it. The Reporters (Carrington and Payne) give the substance of the case thus: "In order to reduce the killing of a person to
(369) manslaughter, there must not only be a sufficient provocation, but the jury must be satisfied the fatal blow was given in consequence of that provocation. If A. had formed a deliberate design to kill B., and, after this, they meet and have a quarrel, and many blows pass, and A. kills B., this will be murder, if the jury are of opinion that the death was in consequence of the previous malice, and not of the sudden provocation." What would the crime be, if the jury should be of the opinion that the death was in consequence of the sudden provocation, and not of the antecedent malice? I answer, only manslaughter. And then is it not a question for the jury to decide, whether the death blow was inflicted in consequence of the previous malice or in consequence of the sudden provocation? It seems to me that it is. "In every case, where the point turneth upon the question, whether the homicide was committed wilfully and maliciously, or under circumstances justifying, excus-

ing or alleviating, the matter of fact is the proper and only province of the jury." Foster's C. L., 255. In the case of the *Queen* v. *Kirkham*, Judge COLERIDGE begins his charge to the jury, by shewing the distinction between the crime of murder by malice implied in law, from death happening by the use of a deadly weapon, where no provocation had been given, and the crime of manslaughter, where death is inflicted by a deadly weapon, but where a sufficient provocation had been given at the time. He says, that, in the first case the slayer is cool and must be taken to have malice; in the other, he has not malice, if he acted upon the provocation. He then proceeds to say, "If a person has received a blow, and, in the consequent irritation, immediately inflicts a wound that occasions death, that will be manslaughter. But the slayer shall not be allowed to make this blow a cloak for what he does; and, therefore, though there has been an actual quarrel, and the deceased shall have given a number of blows, yet if the party inflicted the wound, *not in consequence of those blows*, but *in consequence of previous malice*, all the blows will go for nothing. So, in the present case, if there was a stab given in consequence of a grudge, entertained a day or two before, all that passed between these parties at the very time must go for nothing, for the simple reason that the blows
(370) were not the cause of the crime." The Reporters then make Judge COLERIDGE to say to the jury, "So that if you believe, on the Monday or Wednesday before, the prisoner used the threats that have been sworn to, deliberately, then all the quarrel and the wrestling may be entirely dismissed from your consideration." The English Reporter or the printer must, in the last quoted part of the charge of the Judge, have omitted these words: "if the prisoner had killed his son with the knife, in consequence of those previous threats deliberately made." If the omission, which I contend is made in the report, be not supplied some way, then the report of the case makes Judge COLERIDGE contradict himself; for his remarks, just before made, had left the jury to understand, that if the fatal stroke was given from immediate provocation, which the blows given by the deceased had produced, it would be but a case of manslaughter, notwithstanding the antecedent grudge. In this way, the opinion of Judge COLERIDGE will correspond with what is said to be the law by Mr. East in his Pleas of the Crown, 224, and other writers. Mr. East says: "when fresh provocation intervenes between preconceived malice and the death, it ought clearly to appear that the killing was upon the antecedent malice; which

may be difficult to shew satisfactorily, if the new provocation was a grievous one." "In such cases," says Hawkins, "it shall not be presumed they fought on the old grudge, unless it appear by the whole circumstances of the fact." That Baron Cowyns understood Hale to hold the law to be the same way is to be seen, 4 Com. Dig. (Justices) M., 16. "Though there was former malice, if they were reconciled and quarrel upon a new occasion. So if they fight upon malice and are parted, and afterwards fight upon a sudden, it is but manslaughter in each case." He cites Hale's P. C., 49, for both positions. In such a case, it seems to me, the jury are at liberty to say there was a *cesser* of the previous malicious intent, and that the presumption was, that the act flowed from a *new* and a different cause; and if the act flowed from the violent provocation immediately given, it could not flow from the antecedent malice: therefore the killing could
(371) not be murder, for it lacked the necessary ingredient to constitute that crime, viz: killing with malice aforethought, or by the promptings of aforethought malice. Notwithstanding, I admit that the presumption may be repelled; and if the jury were satisfied that the killing was upon the antecedent malice, it would be murder. 1 East., 232; 1 Hale P. C., 452. The law as I have here stated it to be, was so understood by the Judge and the counsel, both for the State and the prisoner.

To get clear of what seemed to be the recent provocation, the counsel for the State insisted, that the prisoner *sought* what was done by the deceased, as a pretext or cloak to fire upon him and kill him. We are now called upon to review the charge of the Judge upon this particular point in the case, under all the facts that had been proved by the two witnesses, Mangum and Pollard. Whether the prisoner *sought* a provocation to be given by Beasley, that he might kill him, was the turning point of life or death in this case. Where is the evidence that the prisoner went to the shop with that view, or that he sought a provocation to kill him? They never before had even angry words; the shop was a tippling shop, and belonged in part to the prisoner's father; the prisoner loved ardent spirits; was it not natural, then, that he should go there to gratify his propensity for drink? The prisoner's being at the shop that night is, then, reasonably and naturally accounted for. What next? The prisoner and O'Bryan quarrel; who began the quarrel is not stated. Is it remarkable that a man, who was in drink at dinner time and in a tippling shop at night, should be in a quarrel with another man in the same shop? It is well known to be a frequent occur-

rence; therefore there is nothing, as it seems to me, in this circumstance. What next? The deceased, the keeper of the shop, tells the prisoner to behave himself; the prisoner says "do you take it up?" Is there any thing remarkable in the fact of a man in a passion, in a war of words with another person, being thus accosted, making just such an answer? I think not. The deceased and the prisoner quarrel for some time; afterwards, the prisoner said he would go to bed; the deceased said he
(372) should not; the prisoner said it was hard he could not go to bed in his father's house, (Ragan, the part owner of the house, there and making no objection;) he took a candle and attempted to go up stairs, where there was a bed; the deceased, without any notice to the prisoner to leave the house, illegally takes him by the collar, drags him through two rooms and kicks him out of doors, and instantly the prisoner fired the pistol. And these slight circumstances are left by the court to the jury, to find the life or death fact, that the prisoner went to the shop that night with the *design to seek* a provocation to kill a man, that he never before had an angry word with. It seems to me that all these things, taken together, do not raise any, or at most, but a very slight presumption of the fact sought to be established, viz: that the prisoner sought a provocation, as a pretext to kill Beasley. I admit that a man may be found guilty of murder upon presumptive evidence. But the presumption must be strong and cogent, not leaving on the mind a rational doubt to the contrary. If the presumption of a material fact be slight, as I think it was in this case, it availeth nothing; it is *no* evidence in a life and death case, and the Judge should have so informed the jury. He did not; but he left the jury to find a fact, which would raise the crime from manslaughter to murder, upon circumstances which the law pronounces to be *no* evidence to prove that fact. The words made use of by the prisoner, after he had fired the pistol, in my mind, weigh nothing. They were or might be the ebullitions of a vulgar mind, made in the moment of anger and great exasperation from the recent provocation.

I think there should be a new trial.

PER CURIAM. Judgment of the Superior Court affirmed.

MEMORANDUM.

At the session of the General Assembly 1840–1841, the Honorable WILLIAM H. BATTLE, who had been temporarily appointed by the Governor and Council, was elected a Judge of the Superior Courts of Law and Equity.

At the same session, MATTHIAS E. MANLY, Esquire, was elected a Judge of the Superior Courts of Law and Equity in the place of the Honorable Edward Hall, whose commission had expired.

At the same session, Hugh McQueen, Esquire, was elected Attorney General in the place of John R. J. Daniel, Esquire, whose commission had expired.

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA.

JUNE TERM, 1841.

(375) STATE *vs.* ABRAHAM CROW.

1. It is not sufficient, to constitute an assault, that a man of ordinary firmness should believe he was about to be stricken; but if it can be collected from the circumstances, that, notwithstanding appearances to the contrary, there was not a present purpose to do an injury, there is no assault. The jury must judge of these circumstances.
2. When the defendant, at the time he raised his whip, and shook it at plaintiff, though within striking distance, made use of the words, "were you not an old man, I would knock you down," this does not import a present purpose to strike, and does not in law amount to an assault.
3. The case of the *State* v. *Davis*, 1 Iredell's Rep., 127, cited and approved.

The defendant was indicted and tried at the Spring Term, 1841, of Rutherford Superior Court, before his Honor Judge BATTLE, for an assault on one William Grayson. The case appeared to be this. One witness testified that he heard (376) the parties have some words, and he then saw the defendant raise a whip, which he had in his hand, and shake it at Grayson, swearing that he had a great mind to kill him; and that, at the time when the defendant raised his whip, he was within striking distance of Grayson, but did not strike him, although not prevented from doing so by the interference of any other person. One or two other witnesses testified that they did not see the defendant raise the whip, but heard him say to Grayson, "were you not an old man I would knock you down." The defendant's counsel contended that no assault was proved, because the words which accompanied his acts, qualified them and shewed that he had no intention of striking, and consequently there was no such offer or attempt to strike as constituted an assault. The Court charged the jury that, notwithstanding the words used by the defendant when he raised his

whip and shook it at Grayson, yet if his conduct was such as would induce a man of ordinary firmness to suppose he was about to be stricken and to strike his assailant in self defence, the latter would be guilty. Otherwise, there might be a fight and the peace broken, and yet neither party be guilty. And further, that otherwise, one man might follow another all over the Court yard, shaking a stick over his head, and yet not be guilty, provided he took care to declare, while he was doing so, that "he had a great mind to knock him down."

The jury found the defendant guilty, and a new trial being refused, judgment was pronounced against him, from which judgment he appealed to the Supreme Court.

The Attorney General for the State, cited *Archbold's Crim. Plead.*, 347; *Hawkins*, c. 52, s. 1.

No counsel appeared for the defendant.

DANIEL, J. The Judge charged the jury "that if the conduct of the defendant was such as would induce a man of ordinary firmness to suppose he was about to be stricken, and to strike in self defence, the defendant would by such conduct be guilty of an assault." We admit that such conduct would be strong evidence to prove, what every person who relies on the plea of *son assault demesne* must prove to support his
(377) plea, to-wit, that his adversary *first* attempted or offered to strike him; but it is not conclusive evidence of that fact: for if it can be collected, notwithstanding appearances to the contrary, that there was not a present purpose to do an injury, there is no assault. *State* v. *Davis*, 1 Iredell's Rep., 127. The law makes allowance, to some extent, for the angry passions and infirmities of man. It seems to us, that the words used by the defendant, cotemporaneously with the act of raising his whip, were to be taken into consideration, as tending to qualify that act, and shew that he had no intention to strike. The defendant did not strike, although he had an opportunity to do so, and was not prevented by any other person. The Judge should, as it seems to us, have told the jury, that if, at the time he raised his whip and made use of the words, "were you not an old man I would knock you down," the defendant had not a present purpose to strike, in law it was not an assault. We again repeat what is said in Davis' case. "It is difficult to draw the precise line which separates violence menaced from violence begun to be executed, for until the execution of it be begun, there can be no assault." The evils, which the Judge supposed might follow, if

the law was different from what he stated it to be, can always be obviated by the offending party's being bound to his good behaviour. There must be a new trial.

PER CURIAM. New trial awarded.

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(378) STATE *vs.* JOEL FORE and SUSAN CHESNUT.

1. The marriage between a free person of color and a white person is, by the law of this State (act of 1838, c. 24), null and void, and therefore, when such persons bed and cohabit together, they come within the provisions of the act of Assembly against Fornication and Adultery. Rev. St., c. 34, s. 46.
2. An indictment ought to be certain to every intent and without any intendment to the contrary. But if the sense be clear and the charge sufficiently explicit to support itself, nice objections ought not to be regarded.
3. An indictment, charging that J. F. did "take into *his* house one S. C. and they did then and there have *one or more children* without parting, or an entire separation, they, the said J. F. and S. C. never having been lawfully married," is sufficiently certain, though carelessly expressed. The court must intend from these expressions that the parties were of different sexes.

This was an indictment against the defendants, tried at Spring Term, 1841, of Lenoir Superior Court, before his Honor, Judge BAILEY. The indictment was in the following words, to-wit:

"State of North Carolina, } Superior Court of Law,
Lenoir County. } *ss.* Fall Term, 1840.

The Jurors for the State upon their oaths present, that Joel Fore, late of the County of Lenoir, on the first day of August, in the year one thousand eight hundred and forty, and on divers other days and times before the taking of this inquest, with force and arms, at and in the county aforesaid, did take into his house one Susan Chesnut, and they did then and there live and bed and cohabit together without being lawfully married, contrary to the form of the Statutes in such cases made and provided, to the evil example of all others in like case offending, and against the peace and dignity of the State.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that Joel Fore, late of the county aforesaid, on the day and year aforesaid, and on divers other days and
(379) times, at and in the county aforesaid, with force and arms, did take into his house one Susan Chesnut, and they did then and there have one or more children, without parting, or entire separation, they, the said Joel Fore and Susan Chesnut, never having been lawfully married, contrary to the

act of Assembly in such case made and provided, to the evil example of all others in like case offending, and against the peace and dignity of the State."

Upon the trial it was proved that the defendants had, continuously for a year immediately preceding the finding of the bill of indictment, bedded and cohabited together as man and wife, and had one child without parting; and it was admitted by defendants' counsel, that the defendant Joel was a free person of color, and the defendant Susan was a white woman. The defendants' counsel offered in evidence a license from the Clerk of the County Court, authorizing the marriage of the defendants, bearing a date subsequent to the act of Assembly passed during the session of eighteen hundred and thirty-eight—nine, declaring marriages between free persons of color and white persons null and void; and further offered to prove that the marriage was duly solemnized in the year 1840, prior to the cohabitation. The court rejected this testimony, and the defendants were convicted. Rule for a new trial upon the ground of the improper rejection of testimony. Upon argument the rule discharged. Whereupon, the defendants' counsel moved in arrest of judgment. This motion was overruled, and judgment pronounced for the State. From this judgment the defendants appealed to the Supreme Court.

The *Attorney General* in support of the conviction and judgment, relied upon the Rev. Stat., c. 34, s. 46 and act of 1838–9, c. 24

No counsel appeared for the defendants.

DANIEL, J. The act of Assembly, cited in this case, declares that all marriages between free persons of color and white persons, shall be null and void. The court, we think, very properly rejected the evidence offered of a marriage
(380) between these parties after the passage of the act. The license issued by the clerk was void; and no person in this State, at the time mentioned, had a legal authority to solemnize the rites of marriage between the defendants.

Secondly; the defendants moved in arrest of judgment, which motion was overruled by the court. We have examined the indictment, and, although it appears to be very carelessly drawn, still we think that the *second count* in it is sufficient in law. The crime of fornication, as described in the act of Assembly, consists in "a man taking a woman, or a woman a man into his or her house, and having one or more children without parting or an

entire separation, or where they bed or cohabit together, they not being lawfully married." The second count in the indictment charges that "Joel Fore unlawfully did take into *his* house one Susan Chesnut, and they did then and there have *one or more children*, without parting or an entire separation, they the said Joel Fore and Susan Chesnut never having been lawfully married." First, it is not stated in the indictment that Susan Chesnut is a woman or that Joel Fore is a man. As to Fore, we can see that a male is described, from the words "did take into *his* house one Susan Chesnut;" the word *his* being a pronoun of the masculine gender. But it is not so easily seen that Susan Chesnut is a woman. It is a rule of law that all the facts and circumstances, which make up the body of an offence, must be stated in an indictment with sufficient certainty. The indictment ought to be certain to every intent, and without any intendment to the contrary. But if the sense be clear, and the charge sufficiently explicit to support itself, nice objections ought not to be regarded. 1 Chitty's Crim. L., 172. We admit that no latitude of intention can be allowed to include any thing more than is expressed. What is expressed here? It is that Fore "did take into his house one Susan Chesnut, and they did then and there have one or more children without parting or entire separation, they, the said Joel Fore and Susan Chesnut having never been lawfully married." From what is expressed in the indictment, must not the court necessarily see that Susan Chesnut is a woman? We think that there cannot be any intend-
(381) ment fairly raised to the contrary. The statement in the indictment that these parties "had one or more children," is an averment that they had at least *one* child; and that is suffiicient, *first* to establish the sex of the parties, and, secondly, to constitute the offence created by the Statute.

There was, therefore, no error in the judgment of the Superior Court, which must be certified accordingly.

PER CURIAM. Ordered accordingly.

STATE *vs.* DANIEL L. COCKERHAM.

1. The court can, in no case where the Grand Jury returns a bill "not a true bill," order the prosecutor to pay the costs.
2. Nor is an indictment for perjury one of those "frivolous or malicious" prosecutions, in which the court has power, even upon an acquittal of the defendant by a petit jury, to order the prosecutor to pay the costs, because at the time the act was passed giving the court power in certain cases to order the prosecutor to pay costs, the punishment of perjury did extend, and, in some peculiar cases, does now extend, to the loss of a member.

STATE *v.* COCKERHAM.

This was an appeal from an order of the court below, directing the prosecutor to pay the costs of an indictment for perjury, on which the Grand Jury had returned "not a true bill." The appeal came from the Superior Court of Macon County, Spring Term, 1841, at which his Honor Judge BATTLE presided. The following case was sent to this court by the presiding Judge.

This was an indictment against Rebecca Stillwell for perjury, upon the prosecution of one Daniel Cockerham. The Grand Jury found the bill "not a true bill," and thereupon a motion was made that the prosecutor should pay the costs, upon the ground that the prosecution was frivolous and malicious. The motion was resisted upon the grounds, 1st. Be-
(382) cause the offence charged in the indictment was not one, in which the court had authority to order the prosecutor to pay the costs; and 2ndly, because the act of Assembly only empowered the court to order the prosecutor to pay the costs, where the defendant was acquitted, and that the finding of the bill "not a true bill" by the Grand Jury, was not within the meaning of the act. The court held that the offence was such an one as came within the meaning of the act authorizing the court to order the prosecutor to pay the costs, upon the prosecution appearing to be "frivolous or malicious." But it was inclined to hold that the acquittal, mentioned in the statute, meant an acquittal before the petit jury; because that is the most common and obvious meaning of the term, and the act seemed to contemplate a trial in court, where the Judge might himself see from the evidence that the prosecution was frivolous or malicious: but it being stated by counsel at the bar that such orders had been made by judges, on former occasions, upon bills being ignoramused by Grand Juries, the court said it would allow the motion and make the order, so that the case would be taken to the Supreme Court, where the question could be settled.

It was accordingly ordered that the prosecutor, D. L. Cockerham, pay all the costs of the prosecution with the Solicitor's fee of ten dollars. From which order, the said D. L. Cockerham appealed to the Supreme Court.

Attorney General for the State.
No counsel for the defendant.

DANIEL, J. The defendant as a prosecutor, had exhibited a bill of indictment for perjury, against one Rebecca Stillwell. The Grand Jury returned it "not a true bill." A motion was

then made that the prosecutor should pay the costs. The court made the order accordingly, and the prosecutor appealed.

It seems to us that there are two good and legal objections to the order made by the Superior Court. *First*, in the *State* v. *Lumbrick*, 1 Law Rep., 543, it was decided that the act of Assembly did not authorize the court to order the prose-
(383) cutor, under any circumstances, to pay the costs, on the acquittal of a defendant on an indictment for an offence, the punishment of which would extend to life, limb or member; such charges were not to be considered "of an inferior nature." The crime of perjury (at the time the act was passed which gave the court power to make the prosecutor pay costs in certain cases,) did, in its punishment, extend to affect a member of the offender, and in some cases by the act of 1831, Rev. St., c. 34, s. 52, does still extend to it. This case, therefore, is not within the act of Assembly. *Secondly;* when a defendant "shall be acquitted by any charge of an inferior nature, the court may, at their discretion, order the prosecutor to pay costs, if such prosecution shall appear to have been frivolous or malicious." Rev. St., c. 35, s. 27. We think that the Legislature by this enactment intended to give the power of ordering the prosecutor to pay costs, only in those cases, where it appeared to the court, who tried the indictment, that the prosecution was frivolous or malicious. The court could not be supposed to be acquainted with the evidence given before the Grand Jury; and therefore, on a return of "not a true bill" on an indictment, it could not appear to the court whether the prosecution had or had not been frivolous or malicious. This view is strengthened by the peculiar provision made in another section of the same act, Rev. St., c. 35, s. 23, by which it is directed that when an indictment shall be found by the Grand Jury, and a *nolle prosequi* entered, the court may examine whether the prosecution was promoted on frivolous or malicious pretences, and, if so, decree that the prosecutor shall be subject to pay the costs.

The judgment must be reversed.

PER CURIAM. Judgment accordingly.

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(384) STATE *vs.* WILLIAM KIRKHAM.

1. On an indictment for retailing spirits by the small measure without a license, where the contract appeared to be to deliver to the purchaser from time to time spirits, in parts of a quart as he should call for them, with an engagement on his part to take, in the whole, a quart in quantity, and an

engagement on the part of the seller not to exact payment until that quantity should be received, *it was held* by the Court, that this was a violation of the act of Assembly, prohibiting the sale of spirits by the small measure without a license.

2. Where in such a case the special verdict does not find *that the selling was without license*, judgment must be rendered for the defendant; for such an averment is necessary in an indictment under the Statute, and in a special verdict must be found by the jury.

This was an indictment against the defendant for retailing spirituous liquors "by the small measure, to-wit, by a measure less than a quart, without first obtaining a license therefor according to law, against the form of the statute, &c." The case came on for trial upon the plea of not guilty, at Randolph Superior Court of Law, before his Honor Judge PEARSON, when the jury found the following special verdict: "We find, that about eighteen months ago, at a muster at one McMaster's, the defendant had spirituous liquors in a small waggon for sale, and that one Emsley Fields applied to him for the purpose of purchasing some; that the defendant told him he could not sell less than a quart; that Emsley Fields agreed to purchase a quart, provided the defendant would permit him to take it in small quantities, as he might want it, until the quart was taken, to which defendant agreed; and that during the day Emsley Fields took three cups full, the cup holding half a pint. We further find, that in July last, at a muster at one Cox's, the defendant again had spirituous liquors in his waggon, when Fields got of him the remaining half pint, and paid him for the quart twenty cents, which was the price originally agreed upon. We further find, that twenty cents was the price at which the
(385) defendant usually sold spirituous liquors by the quart, but that Fields would not have purchased but for the agreement on the part of defendant that he might take it in small quantities, as he might want it. Whether upon these facts the defendant be guilty in manner and in form as charged, the jury are ignorant, and pray the opinion of the court. If the court be of opinion that upon these facts the defendant is guilty, then the jury find him guilty, &c., but if the court should be of opinion that upon these facts he is not guilty, then the jury find that he is not guilty." The court was of opinion that the facts did not make a case of selling and retailing by the small measure, under the statute, and judgment was entered for the defendant, from which judgment the Solicitor for the State prayed an appeal to the Supreme Court, which was granted.

Attorney General for the State.
No counsel for the defendant.

GASTON, J. The offence described in the statute upon which this indictment is founded, is "to retail spirituous liquors by the small measure, that is to say, in quantities less than a quart without a license," and the question intended to be presented for our consideration upon the special verdict is, whether the facts found by the jury shew that the defendant did so retail. To retail, in its ordinary sense, means to sell by small quantities or in severed parts, and the doubt is, whether the sale in this case was in law a sale of spirits by the quart, or by the parcels of a quart, as they were delivered and agreed to be delivered. If the contract of the parties had been that the seller should deliver a quart of spirits, which particular quart should thereupon become the property of the purchaser, although the seller were by agreement to retain it for the purchaser, so as to be used from time to time as the latter might require, we suppose that such a contract (unless perhaps it were found by the jury that there was an intent thereby to evade the Statute,) must have been held to be a contract for a sale by the quart. But in this case the
(386) contract was to deliver to the purchaser, from time to time, spirits in parts of a quart, as he should call for them, with an engagement on his part to take in the whole a quart in quantity, and an engagement on the part of the seller not to exact payment until that quantity should be received. Under this contract the purchaser became the owner of each cup-full or half pint of spirits as it was delivered, and the residue still remained the property of the seller. If the purchaser, after receiving one or more of his half pints, called for the remainder, the seller's engagement would have been satisfied by delivering what was wanted to make up the quart of other spirits of the same kind and quality. To such a transaction, whereby the thing is transferred from one to the other by small quantities or in several parts for a price, the term retailing is properly applied, notwithstanding the stipulation on one side that the amount to be purchased shall be *to the value* of a larger quantity or of an unsevered whole, and of the stipulation on the other to allow a credit until such an amount in value should be received. And if this be the legal character of the transaction, we are the more disposed so to regard it, as any other construction of the contract would defeat, in a great number of cases, the primary object which the Legislature intended to accomplish by the Statute.

But, notwithstanding our opinion upon this question, we can-

not pronounce the judgment below erroneous. That judgment was rendered upon a special verdict; and a fact, which is indispensable to the constitution of the offence, wherewith the prisoner was charged, is not found. The indictment would have been fatally defective, had it omitted to aver that the defendant retailed *without a license;* and the verdict is insufficient to warrant a conviction, in omitting to find this averment. All the circumstances constituting an offence must be found, in order to enable a court to give judgment, and it is not in the power of the court to supply a defect in the finding of the jury by intendment or application.

(387) This opinion must be certified to the Superior Court of Randolph, with instructions to render judgment for the defendant.

PER CURIAM. Ordered accordingly.

Den on demise of THE UNIVERSITY OF NORTH CAROLINA *vs.* WILLIAM BROWN.

Where an estate had been transmitted by descent, and the blood of the acquiring ancestor had become extinct, upon the death of the person last seized intestate and without issue, the estate descended to her nearest collateral relations, who were a brother and two sisters of the half blood on her father's side, the land having descended from a maternal ancester.

This was an ejectment brought by the plaintiff, in Northampton Superior Court, and tried at Spring Term, 1841, of that court, before his Honor Judge SETTLE. The following case agreed, was submitted to the court. The land described in the declaration, belonged in fee simple, to Mrs. Cocke, the wife of Archibald Cocke, who acquired it by devise. Mrs. Cocke died about the year 1814, intestate, leaving an only child, a daughter, her heir at law, Elizabeth, who intermarried with John Peter, and died in the year 1817, intestate, leaving an only child, a daughter, the issue of the said marriage, by name Margaret M. Eliza, who intermarried with Colin Peter, and died in 1839, intestate, and without issue, and never having had issue. John Peter, the father of Margaret M. Eliza, after the death of her mother, and during the life of said Margaret M. Eliza, married a second and third time, and had issue, a son and two daughters, who are still living, and under whom defendant claims title, and holds the possession. Archibald Cocke and John Peter both died before the commencement of this suit, and the blood of Mrs.

Cocke, the wife of Archibald Cocke, became extinct on
(388) the death of Margaret M. Eliza Peter, wife of Colin Peter. The plaintiff claimed the land as escheated.

And the court, being of opinion that the plaintiff was not entitled to recover, judgment was rendered for the defendant, from which the plaintiff appealed to the Supreme Court.

W. H. Haywood for plaintiff.
Iredell for defendant.

DANIEL, J. Mrs. Cocke acquired the land by devise; she is therefore to be considered as the first purchaser. On her death, the inheritance descended to her only child, Elizabeth. On the death of Elizabeth, it descended to her only child, Margaret, who died intestate and without issue, leaving a brother and two sisters (by the name of Peter) of the half blood *ex parte paterna*. The question submitted was, whether the land had escheated to the University. It is enacted by Rule 5th in the Canons of Descent, Rev. St., c. 38, that "on failure of lineal descendants, where the inheritance has *not* been transmitted by descent or derived from an ancestor (as mentioned in the 4th rule,) or where, if so transmitted or derived, the blood of such ancestor is extinct, the inheritance shall descend to the next collateral relations of the person last seized, whether of the paternal or maternal line." In this case, the land had been transmitted by descent from an ancestor to Margaret, the person last seized; but the blood of Mrs. Cocke, the ancestor, has become extinct. On this event happening, the inheritance descended, according to the aforesaid rule, to the next collateral relations of the paternal line of Margaret, the person last seized. These persons are her brother and sisters of the half blood, the children of her father, John Peter.

We are of the opinion that the lands mentioned did not escheat. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

(389) WILLIAM H. DAVIS *vs.* WILLIAM W. SANDERLIN & al.

1. In all cases of joint obligations, &c. suit may be brought against the whole, or one or more of the persons making such contract. Therefore, where one was sued alone on a joint obligation, and the jury found upon the plea of the defendant that he was only a surety, this was an immaterial plea, and of course an immaterial finding, and the defendant could not avail himself of the provisions of the act of Assembly, Rev. Stat., c. 31, s. 131, 132, relating to judgments against a principal and surety.

2. In such a case, an indorsement on the execution, according to the provisions of that act, is absurd and unmeaning.

This was an action on the case tried before his Honor Judge NASH, at Spring Term, 1841, of Pasquotank Superior Court of Law, upon the following case, agreed: The plaintiff was the surety of one Knox, and suit was commenced against him alone, by the defendants, on the note given by Knox and himself. Davis, the defendant in that suit, and plaintiff in this, pleaded "that he was the surety of Knox," and that plea was found in his favor. Judgment was rendered upon the note against Davis, and the present defendants caused a *ca. sa.* to be issued thereon, with the following indorsement made by order of the court on the back of the writ, to-wit, "It appears to the court, that William H. Davis, the defendant, is the surety of Ambrose Knox, and the sheriff will levy this execution upon the goods and chattels, lands and tenements of the principal, or so much thereof as shall be necessary to satisfy this execution; and for want of such property of the principal, or so much thereof as shall be necessary to satisfy said execution, also on the goods and chattels, lands and tenements of the defendant, and first sell the property of the principal." The present defendants gave the Sheriff a bond to indemnify him for disobeying the endorsement on the execution of *capias ad satisfaciendum*, and he collected the whole amount out of the surety, William H. Davis, by arrest of his
(390) person. It also appeared, that Knox, the principal, had removed from this State, but that he returned to the County of Pasquotank every year; and that he was not in the County at the time the writ was issued: he had left the County a few days before, and might have been sued at the same term to which the surety was sued. It further appeared, that Knox had more than sufficient property in the County to satisfy the debt, on which an attachment might have been levied. To this latter evidence, plaintiff objected, but it was admitted by the Court. On these facts, his Honor was of opinion the plaintiff could not recover, and directed a nonsuit, from which judgment the plaintiff appealed to the Supreme Court.

Kinney for the plaintiff.
A. Moore for the defendant.

DANIEL, J. In all cases of joint obligations, assumpsits or agreements, suits may be brought and prosecuted on the same against the whole, or one or more of the persons making such contracts. Rev. St., c. 31, s. 89. Davis, under the aforesaid

act, had been sued alone on a bond executed jointly by himself and one Knox. The plea put in by Davis in the County Court, "that he was a surety for Knox," was an immaterial plea. For the act of Assembly, of which he wished to take the benefit, applied only to trials at law, where both the principal and surety to the contract were defendants. In such a case, the jury by their verdict, or the justice of the peace in his judgment, (if it appeared by evidence,) should discriminate the principal and surety: which discrimination was to be endorsed on the execution, and the officer, by force of the act, was to satisfy it *first* out of the property of the principal debtor, or, for want of such sufficient property of the principal, then out of the property of the surety. Rev. St., c. 31, s. 131, 132. Where the surety was sued alone, as Davis had been, the aforesaid act had no applicability. Sanderlin by law, had a right to have the writ of *ca. sa.* issued on his judgment against Davis; and the County Court had no authority, under that act, to endorse on the *ca. sa.*
(391) the direction to the Sheriff which they did. Knox had not been a party defendant; there was no judgment against him; his being absent from the State and having no property here, made no difference; and of course the court could not legally award execution against his property. The whole memorandum or direction endorsed on the *ca. sa.* was therefore absurd and unmeaning, and the Sheriff acted correctly in obeying the legal command to him, contained in the face of the writ. We are of the opinion that Davis has not sustained any injury in consequence of the acts of the Sheriff, whereby he could legally sustain this action.

The judgment must be affirmed.

PER CURIAM. Judgment accordingly.

Den on demise of ISAAC T. POOR *vs.* THOMAS S. DEAVER.

1. Where an execution on a judgment is returned satisfied, the judgment is extinguished; and another cannot be issued, as for instance for attendance dues for a witness omitted in the first execution, until the return on the first execution is set aside or corrected, or an order of the court in nature of a further judgment is rendered.

2. The cases of the *Governor* v. *Twitty*, 1 Dev., 153, and *Snead* v. *Rhodes*, 2 Dev. & Bat., 386, cited and approved.

This was an action of ejectment tried at Spring Term, 1841, of Buncombe Superior Court of Law, before his Honor Judge BATTLE. The following is the case reported by the Judge:

Both parties claimed under one William Keith. The plaintiff's lessor produced a record of the County Court, shewing a suit between one Craven Jinkins and the said William Keith
(392) in which the latter was plaintiff, and upon the trial docket there appeared simply an entry of the jury's being impannelled, and their finding a verdict for the defendant in that action. There was no entry of judgment against the plaintiff for costs; and the counsel for the defendant in this case objected that there was not even such a memorandum for a judgment as would support the execution which was issued. The plaintiff's lessor then produced an execution of *fi. fa.* in favor of the said Jinkins, against the said Keith, purporting to have issued for the costs in the said suit, tested of the August Term of the County Court, 1833, and returnable to the following January Term. Upon this execution the Sheriff returned, "satisfied, retain my fees, pay in office $8.90 cts." He then produced another execution, which did not purport to be an *alias*, but which issued, as alleged, for the amount of a witness ticket, not filed when the former execution issued. This *fi. fa.* bore teste of January Term, 1834, and was endorsed by the Sheriff, "Came to hand March 23d, 1834," but no return appeared upon it. Upon this execution was another endorsement: "Z. Candler, witness ticket, to the use of John Patton, $11.80 cents. This ticket was brought in since the issuing of the former *fi. fa.* in this case; therefore, for this *fi. fa.* 35 cts. and fees of collection are to be retained out of this ticket." The plaintiff's lessor then produced another *fi. fa.* tested of April Term, 1834, and returnable to the ensuing term, not purporting to be an *alias*, upon which the land in question was sold, and bought by the plaintiff's lessor. He also produced a *fi. fa.* from the Superior Court of Buncombe County, tested of March Term, 1834, and returnable to the ensuing Fall Term of the same, in favor of *Reuben Keith* v. *William Keith*, upon which the Sheriff returned "no goods." The defendant claimed under a deed from the said William Keith to himself for the said land, dated the 26th of September, 1833, and his counsel contended that as the first *fi. fa.* produced by the plaintiff's lessor was returned "satisfied," and the others did not purport to be *aliases*, and were not in fact such, the defendant's title was preferable to that of the plaintiff. The latter then offered to prove, that while the two last executions from the County Court were in the Sheriff's hands,
(393) the defendant promised to pay them, but afterwards refused. The court held that the execution, under

which the plaintiff's lessor purchased the land in controversy, could not be connected with the one which issued from the August Term, 1833, so as to give his title a preference to that acquired by the defendant under his deed from William Keith, and that the parol testimony offered by the plaintiff's lessor, was immaterial and inadmissible.

In submission to this opinion, the plaintiff's lessor submitted to a judgment of nonsuit, and appealed to the Supreme Court.

No counsel appeared for either party in this court.

GASTON, J. The opinion, delivered by the presiding Judge on the trial, is perfectly correct. The only execution against the property of Keith, which was in existence at the time of the sale to the defendant, was returned satisfied. It is impossible, therefore, to hold that the sale was in fraud of this execution. As to the subsequent executions, which purported to issue for the attendance dues of a witness, omitted in the first execution, these neither were nor purported to be *alias* executions. They could not therefore, if regular, be allowed to overreach a *bona fide* alienation made before their teste. But they were irregular and issued without authority. After the return of satisfaction upon the first execution, the judgment theretofore rendered was extinguished, and until the return was set aside or corrected as a further judgment, or order of the court in nature of a further judgment was rendered, there was nothing of record to warrant further proceedings against the debtor or his property. *Governor* v. *Twitty*, 1 Dev., 153; *Snead* v. *Rhodes*, 2 Dev. and Battle, 368. The parol evidence offered by the plaintiff, and rejected by the court, was manifestly immaterial as respected the issue to be tried. The promise of the present defendant to pay the amount claimed by these executions, if it impose on him any obligation, did not impair his title to the land, which had been conveyed to him.

PER CURIAM. Judgment affirmed.

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(394) SUSANNAH MATTHIS *vs.* JOSEPH RHEA.

Where a testator bequeathed as follows: "I do will and bequeath unto my wife, Susannah, all my estate and effects remaining in my executor's hands, after all my just debts are paid, the said property to be and remain my beloved wife's during her natural life; she is not allowed to sell or dispose of said effects in any shape whatever, agreeable to this my last will, with the exception of a negro boy child by the name of Larkin. I then further will, that at the decease of my wife, Susannah, command my executors to

make an equal distribution of the said property between my five lawful heirs;" and nothing further is said about Larkin: *Held by the court*, that the absolute interest in the boy Larkin, passed to the widow Susannah.

This was an action of detinue to recover possession of a negro boy named Larkin, tried at April Term, 1841, of Wilkes Superior Court, before his Honor Judge MANLY.

The plaintiff claimed under the will of her late husband, William Matthis, a copy of which was produced on the trial, and is hereto annexed. It was then admitted by the parties, that the legacy of the slave in question was assented to by the executors of the testator, and that the slave went into the possession of the plaintiff, where he remained until a short time before the bringing of this suit; that he was then taken by the defendant, who detained him at the time of the bringing of the action, and still continues to do so.

The presiding Judge instructed the jury that the plaintiff was entitled to recover; that they should, in making up their verdict, estimate the *value* of the slave detained, and also assess damages for his detention, which would be measured by the value of his hire from the time he was taken by the defendant, up to the trial of the action. The defendant insisted, that the jury ought to assess only the value of the life estate of the plaintiff, but the Judge refused so to instruct the jury.

There was a verdict and judgment for the plaintiff, from which the defendant appealed.

(395) Copy of the will of William Matthis, referred to:

"February 1st, 1834. This my last will and testament, in the name of God, amen. *Item*, 1st. I, therefore, feeling my infirmities so sensible, showing me I must shortly drop into the way appointed unto man, into the grave, though being perfectly sound in mind, and in possession of my natural good senses, I do make this my last will and testament. *Item*, 2d. I therefore recommend my soul to God, the giver of the same, and do request my body to be decently buried by my executors, at the expense of my estate. Division; I therefore, for the love I have and bear unto my wife, Susannah, do will and bequeath unto her, all my estate and effects remaining in my executors' hands, after all my just debts are paid, the said property to be and remain my beloved wife's during her natural life. She is not allowed to sell or expose of said effects, in any shape whatever, agreeable to this my last will, with the exception of a negro boy child by the name of Larkin. I then, further will, that at the decease of my wife Susannah, command my executors

to make an equal distribution of the said property between my five lawful heirs. My further will is, that my step-son, Joseph Rhea, shall have an equal share in the division of my land, and nothing else of my estate. I, therefore, feeling a confidence in the honesty of my friends, Benjamin F. Martin and Thomas Matthis, do appoint them my lawful executors, to execute this my last will, with full authority to do the same. Signed and acknowledged in presence of

S. P. Smith,
Reason Bell. WM. MATTHIS."

D. F. Caldwell for plaintiff.
No counsel for defendant.

GASTON, J. It seems to us clear, that it was the intention of the testator to bequeath to the plaintiff, the absolute property in the boy Larkin. To hold that he was excepted out of the gift to his wife, would be to make the testator die purposely intestate as to this boy, for unless he be included in this gift, there
(396) is not only no disposition of him during her life, but he does not fall within the disposition which is to take effect at her death, for *that* is manifestly confined to the same property, which in the previous part of the clause was bequeathed to her. To hold that the exception of Larkin is not from the entire restriction imposed upon the gift of the other property, but only from that part of the restriction which withholds the power of sale or alienation, would be absurd. No reason can be imagined for the testator expressly prohibiting such a power, as inconsistent with an interest for life in the other property, and cautiously providing that the prohibition should not attach to an interest for life in the boy. The only other interpretation that remains, is the one which we adopt, that the exception, with respect to the boy Larkin, is from the restriction imposed upon the gift of the other property, whereby that gift is reduced to an estate for life. The phrase, that "she is not allowed to sell nor dispose of said effects in any way," immediately following the words "during her life," is obviously used out of abundant caution to declare the testator's intent, that a life estate, and no more than a life estate was intended to be given in these effects, and both taken together, constitute *the restriction* from the operation of which the gift of Larkin was to be excepted. The position taken by the defendant, that the jury should have been instructed to find, not the entire value of the negro boy, but only the value of the plaintiff's life interest therein, is predicated upon the supposition

that the plaintiff had but an interest therein for life. As this supposition is deemed by us unfounded, we need not enquire, and therefore forbear to say, whether that position would have been correct or incorrect, had the title been such as was supposed.

PER CURIAM. Judgment affirmed.

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(397) ADAM JAMES *vs.* JAMES S. CLARKE.

Where a man utters slanderous words of another, and at the same time avers that he can prove their truth by a third person, whom he names, this last averment is no mitigation, but rather an aggravation of the slanderous charge, and tending to prove malignity in the speaker.

This was an action on the case for slander, tried at March Term, 1841, of Pitt Superior Court of Law, before his Honor Judge SETTLE. The plaintiff in his declaration, charged the slanderous words in three counts, as follows: In the first count, "you stole my peas and I can prove it;" in the second, "you stole my peas;" in the third, "you stole peas." The plaintiff proved on the trial, that the defendant said, "you stole my peas, and I can prove it by John Hodges," and rested his case. Whereupon, the defendant, contending that the additional words "by John Hodges," were a material qualification of the charge, and did not sustain the charge as alleged, moved that the plaintiff be nonsuited, which the Judge declined doing. The plaintiff then called another witness, A. Parker, who proved the words as alleged in the declaration in the first count, and his Honor charged the jury that, if they believed the witness, A. Parker, the plaintiff had proved the words laid in the first count in the declaration. The jury found for the plaintiff on the first count. A motion was made by the defendant for a new trial, and overruled by the court, and judgment being rendered for the plaintiff, the defendant appealed to the Supreme Count.

No counsel appeared for the plaintiff.
J. H. Bryan for the defendant.

DANIEL, J. The substance of the declaration consists in the charge made by the defendant, that plaintiff had com-
(398) mitted a felony, which charge, if true, would subject him to an infamous punishment. The words "you stole my peas," contain a sufficient charge of felony to support the action. The superadded words "and I can prove it," were not necessary to support the declaration; they were words of aggravation, or as tending to shew malignity in the speaker. The

first witness proved that the defendant spoke the words, which made up the *gist* of the declaration. The additional words, "I can prove it by John Hodges," were not by any means a material qualification of the charge. For if the plaintiff had stolen the defendant's peas, he was equally guilty of a felony, whether the fact could be established by John Hodges or any other person. The defendant did not say that John Hodges had first spoken the words, and that he had only related what he had heard from Hodges, but the evidence was that he, the defendant, first spoke them, and then and there declared that he could establish the truth of them by the testimony of John Hodges. It seems to us, that the plaintiff would have been entitled to recover upon the testimony of the first witness: the evidence of Parker was but confirmatory of that given in by the first witness. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

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(399) HENRY R. AUSTIN, Admr., *vs.* SUSAN HOLMES.

Where an administrator brought an action of assumpsit for goods sold and delivered by his intestate, the defendant pleaded a set off of goods sold and delivered by her to the intestate, the plaintiff replied that there were debts of superior dignity to which his assets were subject, and the defendant demurred to this replication: *Held* by the Court, that the demurrer should be sustained. Our act of Assembly, relating to set offs, has expressly declared, that mutual debts, subsisting at the death of a testator or intestate, between him and another party, shall be set off, notwithstanding the debts may be deemed of different natures.

This was an action of assumpsit, tried at the Spring Term, 1841, of Davie Superior Court, before his Honor Judge MANLY. The declaration was for goods sold and delivered by the plaintiff's intestate, to the defendant. Among other pleas, the defendant pleaded a set off, due by the intestate to her upon an account, and also for goods sold and delivered. To this plea, the plaintiff replied there were debts of superior dignity, to which his assets were subject; the defendant demurred, and the plaintiff joined in the demurrer. The demurrer was sustained by the presiding judge, who gave judgment for the defendant, from which the plaintiff appealed.

D. F. Caldwell for the plaintiff.
No counsel for the defendant.

DANIEL, J. We are of the opinion, that the judgment sustaining the demurrer was correct. The statute of set off (Rev.

St., c. 31, s. 80,) has in these words, "if either party sue or be sued as executor or administrator, where there are mutual debts subsisting between the testator or intestate and either party, one debt may be set against the other, notwithstanding such debt shall or may be deemed in law to be of a different nature."

(400) The plaintiff, as administrator, cannot be injured by the set off being allowed, because he is chargeable only for the balance received after the set off is allowed. *Choses in action*, and debts of all descriptions, due to the testator or intestate, are assets, yet the administrator is not to be charged with them, till he has received the money. Williams on Ex'ors, 1023. An outstanding debt due to a decedent, is not assets in the hands of his executor or administrator, where there has not been gross negligence, or collusive, fraudulent and unreasonable delay in collecting it. *Ruggles* v. *Sherman*, 14 John's Rep., 446. The case of *Shipman* v. *Thompson*, Willes' Rep., 103, is not like this case; there the defendant, *after* the death of his testator, received money due to the testator in his lifetime, and the executor sued in his own name to recover it, and the court held, that the defendant could not to this demand set off a debt due to him by the testator. If the creditor of a testator could seize the assets after the death of the testator, and then, when sued by the executor to regain those assets, be allowed to set off his debt, it would derange all the rules of priority in the legal administration of assets. In the case cited, there lacked, *at the death* of the testator, that mutuality of debt, which the statute permits to be set off. The same law is laid down in *Houston* v. *Robertson*, 6 Taunt. Rep., 448; the executor of an underwriter brought an action against a broker, for premiums due on policies subscribed by the testator, and the defendant was not permitted to set off returns of premium, which became due after the testator's death. The legislature has expressly declared, that mutual debts subsisting *at* the death of a testator or intestate, between him and another party, shall be set off, notwithstanding the debts may in law be deemed of different natures. The judgment must be affirmed.

PER CURIAM. Judgment below affirmed.

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(401) WILLIAM P. LINDSAY *vs.* JOHN KING.

1. In an action of covenant, the defendant, it appeared, covenanted to deliver to the plaintiff a certain quantity of bacon, by a certain time.

2. The defendant cannot, as a defence to this action, either under the plea of performance, or as a set off, or even in diminution of damages, offer in evidence a separate covenant of the plaintiff, dated the same day, to deliver to the defendant a certain quantity of corn, and, in addition, parol proof that the latter covenant was the consideration of the former, and that the latter covenant had been broken.

3. A set off under our statute, must be a *money demand*, and of a *liquidated nature*, and one on which an action of *debt* or *indebitatus assumpsit* would lie.

4. *Dowd* v. *Faucett*, 4 Dev., 92, cited and approved.

This was an action of covenant, tried at the Spring Term, 1841, of Rockingham Superior Court of Law, before his Honor Judge PEARSON. The covenant declared on, was as follows, to-wit, "On or before the 15th of April, I promise to deliver unto William P. Lindsay, in Madison, Rockingham County, North Carolina, twelve hundred and eighty lbs. of good merchantable bacon. JOHN KING, [Seal.]

February 21st, 1840."

The pleas were, "General issue, payment and set off, accord and satisfaction, release, statute of limitation, covenants performed, no breach, mutual and dependent covenant not performed by the plaintiff," to which the plaintiff replied generally. On the trial, the covenant declared on was admitted to be the act and deed of the defendant. The defendant proved, that the plaintiff left the county immediately after the execution of the defendant's covenant, and offered to introduce, in support of his pleas, a covenant of the plaintiff Lindsay, in the words and figures following, to-wit, "One day after date, I promise to deliver to John King, four hundred bushels of good merchantable corn, as value of him received. WILL P. LINDSAY, [Seal.]

February 21st, 1840."

(402) And to prove by parol evidence, that the plaintiff's covenant was executed at the same time, and was the consideration for which the covenant declared on had been given; and it was agreed by the counsel on both sides, that should the court be of opinion that defendant's covenant could be received as evidence, and the parol evidence was competent in bar of the plaintiff's action, or in support of the plea of set off, the plaintiff should submit to a nonsuit; or if it could be received in mitigation of damages, judgment should be rendered for a penny and costs; otherwise, a verdict for the value of the bacon. His Honor being of opinion for the plaintiff, there was a verdict for the plaintiff for the value of the bacon. A motion for a new

trial was made by the defendant, and overruled, and judgment rendered for the plaintiff, from which, the defendant appealed.

J. T. Morehead for the plaintiff.
No counsel for the defendant.

GASTON, J. This action was brought to recover damages for the breach of a covenant, executed by the defendant, on the 21st of February, 1840, whereby he covenanted to deliver to the plaintiff, in the town of Madison and county of Rockingham, 1280 lbs. of good merchantable bacon, on or before the 15th day of April, next ensuing. Among other pleas, not now material to be considered, the defendant pleaded that he had performed his covenant, that the said covenant was dependent upon a certain covenant, which had been executed by the plaintiff to deliver to the defendant a certain quantity of corn, and which had not been performed; and also, a set off of the damages sustained by the defendant, by reason of plaintiff's breach of said last mentioned covenant. Upon the trial, the defendant offered in evidence, a covenant executed by the plaintiff, on the said 21st of February, 1840, whereby he bound himself to deliver to the defendant, one day after date thereof, 400 bushels of merchantable corn, for value received, and further offered to prove by parol, that the latter covenant was executed at the same time with the former, and constituted the consideration for
(403) which the former was given. This evidence was rejected and the plaintiff had a verdict and judgment, and the defendant appealed.

We see no error in the rejection of the evidence offered. It is manifest, that it neither proved nor tended to prove the defendant's plea of performance. The instrument, upon which the defendant was sued, purports to be a single, definite, unconditional engagement under his seal, to deliver a quantity of bacon at an appointed place, upon an appointed day. It has no reference, direct or indirect, to any other contract or engagement between the parties. Its legal construction, and consequently, its legal operation, must therefore depend upon its terms, and cannot be varied or modified by any testimony, *dehors* the instrument itself.

The plea of set off was radically bad, and it would have been idle to admit testimony in support of it. The statute allows "mutual debts" to be set off, and the construction of the statute is settled, that no demand comes within the term "debt," as therein used, except it be a *money demand*, and *of a liquidated*

nature, and one on which an action of *debt* or *indebitatus assumpsit* would lie

Nor was the evidence receivable in diminution of damages. It has been said by us on a former occasion, and we believe correctly, that "damages may be reduced by such things as have been done in execution, or towards the performance of the covenant, but not by any matter, distinct from, or unauthorized by it." *Dowd* v. *Faucett*, 4 Dev., 92.

PER CURIAM. Judgment for plaintiff affirmed.

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(404) Den ex dem. JENNINGS *vs.* STEPHEN STAFFORD.

1. Though a judgment be erroneous, or obtained irregularly, and against the course of the court, yet, while it remains unreversed, it warrants an execution conforming thereto, and upholds the title of a purchaser at execution sale.
2. But if a judgment be rendered by a court having no jurisdiction of the subject matter, or against a person who has not had notice to defend his right, or if it order what the court has not the power to order, it is null and void, and an execution issuing thereon will not protect a purchaser.
3. Where a judgment is rendered upon a former judgment, and execution issues thereon, it is not necessary for a purchaser at a sale, under this execution, to produce the first judgment in support of his title.
4. The case of *Leary & ux.* v. *Fletcher*, 1 Iredell's Rep., 259, cited and approved.

This was an action of ejectment, tried at the Spring Term, 1841, of Pasquotank Superior Court, before his Honor Judge NASH, upon the following case, agreed: The land in dispute, was the property of the ancestor of the lessor of the plaintiff, and descended to him on the death of his ancestor. In September, 1829, a warrant was issued against the administrator of the ancestor, and returned before a magistrate, and judgment entered up as follows, viz: "Judgment for twenty dollars and costs. L. C. Moore, J. P. The administrator pleads fully administered and no assets." Upon this judgment, an execution issued, directed to the constable, against the goods and chattels of the lessor's ancestor, in the hands of the administrator; and upon the execution, the constable made the following return, viz: "The administrator denies that he has assets, and this execution is levied on the lands of James Jennings: bounded, &c." The judgment and execution were then returned to the County Court, and entered upon the docket, and a *scire facias*, reciting said judgment as a judgment rendered by the County Court
(405) issued against the heirs, a guardian *at litem* was appointed by the court, who accepted service of the *scire facias*,

and judgment was entered up in court pursuant to *sci. fa.* by default. The only question in the case was, whether the judgment on the *sci. fa.*, without the finding of no assets before the proper tribunal, was sufficient to authorize an execution and sale of the land. His Honor was of opinion, that it was sufficient, and that the defendant, who was the purchaser under the execution issued upon the judgment, obtained the title; and the plaintiff, in submission to this opinion, suffered a nonsuit, and appealed to the Supreme Court.

Kinney for the plaintiff, contended, that under the act of Assembly, Rev. St., c. 46, s. 25, & c. 63, the want of assets in the administration must be ascertained by a trial or admission in court, before a *sci. fa.* against the heirs could issue, and as that had not been done in the present case, the court had no jurisdiction as against the heirs, and the judgment and execution issued thereon, were null and void; that consequently, no title passed to the purchaser under the execution. He cited *Leary* v. *Fletcher*, *ante*, 259.

A. Moore for the defendant. A purchaser at execution sale, is only required to shew in support of his title, a judgment of a court of competent jurisdiction, and an execution issuing thereon; he is not affected by any irregularity in the judgment; unless the judgment be utterly void, he gets a title. And he contended, that the judgment in this case was merely irregular, but not void. He cited *Oxley* v. *Mizle*, 2 Mur., 250; *Skinner* v. *Moore*, 2 Dev., 138; *White* v. *Albertson*, 3 Dev., 241; Dev. Eq., 506.

GASTON, J. It is the law of this State, that a purchaser at execution sale must shew, not only the execution under which the Sheriff sold, but a judgment warranting that execution. The only reason assigned for this doctrine is, that it must appear that the execution was not the unauthorized act of the clerk, but was awarded by the court. Although the judgment be erroneous; nay, if it be obtained irregularly, and against the course
(406) of the court; nevertheless, so long as it stands unreversed and in force, it is the act of the court, warrants the execution conforming thereto, and upholds the title of the purchaser. But, if what is offered as a judgment have merely the semblance thereof; as if it be rendered by a court having no jurisdiction of the subject matter, or against a person who has not had notice to defend his right, or if it order what the court has not power to order, so that upon its face the law can pronounce it null, it is not a judgment, and the execution issuing thereon will not protect the purchaser.

The execution, under which the defendant in this case sets up title, was awarded by the court, against the lands descended to the plaintiff's lessor, after notice had been issued to him to shew cause against it. But it is insisted on the part of the plaintiff, that the court was not competent in law to award the execution. The argument is, that the *jurisdiction* of the court, in relation to the subject matter of that judgment, is restricted by certain provisions of the acts of 1828 and 1784, embodied into the Revised Statutes, ch. 46, s. 25, and ch. 63. By these, it is enacted, that when an action shall be commenced against an executor or administrator by warrant, and he shall suggest that he has a defence thereto, by reason of a deficiency of assets, the magistrate may proceed to pass upon the demand of the plaintiff, and to give a judgment therefor, but shall return the warrant with the judgment and the suggestion to the County Court, where the defence shall be made, and if on trial, the plea be found for the executor or administrator, then a *scire facias* shall issue to the heir at law, to shew cause why the judgment should not be satisfied out of the lands descended. In the case under consideration, the magistrate, notwithstanding such suggestion, awarded execution against the goods and chattels of the intestate; the officer undertook to levy it on the lands descended; the judgment, execution and levy, were returned to the court; and then a *scire facias* issued, untruly reciting, that there had been a plea of fully administered tried in court, and found for the administrator. And it is asked, can the court, in rendering a judgment upon the *scire facias* thus issued, be considered as acting
(407) within the limits of its authority? The answer to this argument is, that all these irregularities antecedent to the *scire facias*, do not affect the jurisdiction of the court. It possesses jurisdiction *over the subject matter*, and that jurisdiction is derived from the general legislative grant to try and determine causes of a civil nature. If such causes be brought before it irregularly, and objection to the irregularity is shewn in due season, the court will refuse to act, or may revoke any act into which it has been betrayed. But if, notwithstanding such irregularities, it does subsequently act, parties being before it, the act must be respected, because it is the act of a court having authority to try and determine the subject in controversy.

The case of *Leary and wife* v. *Fletcher*, decided at the last term, (*ante*, *p.* 259,) is not an authority for the plaintiff. That was determined upon the ground that the County Court had passed an order, which by law *it could not make.* Having a

special and limited authority to direct the sale of specific parts of an orphan's estate to meet ascertained debts, the court had undertaken to authorize the guardian to sell all or any part thereof *he* might elect, to meet undefined debts. The act done was one wholly without authority, and not an act erroneously or irregularly done within the scope of authority.

It has been further argued, that inasmuch as in ordinary cases, where one judgment only is rendered, that judgment must be shewn by him, who claims to be an execution purchaser, so in the cases where two judgments ought to be rendered before issuing execution, the purchaser should be required to shew both these judgments. We do not admit the correctness of this conclusion. The sole purpose of requiring the exhibition of any judgment is, to shew that the execution has the sanction of the court. Now, if the court render a judgment that the plaintiff recover his debt or have execution, upon a former judgment, when in truth there is no such judgment, the adjudication is erroneous, but nevertheless, while it stands, it is the
(408) solemn act of the court, having *power* so to adjudge, and therefore authorizes process to enforce it. For most purposes, the *scire facias* is a new action, and judgment upon a *scire facias* is sufficient warrant for any execution which conforms to it. Let the judgment be affirmed.

PER CURIAM. Judgment affirmed accordingly.

BENJAMIN F. PETTY, County Trustee, &c., *vs.* EDMUND JONES & al.

1. A *certiorari* will not be granted, where a writ of error will lie.
2. Where certain defendants, securities to a Sheriff's bond, had obtained a *certiorari* to bring up a case from the County Court, where judgment had been rendered against them, and upon the return of the *certiorari*, the Superior Court directed the case to be placed on the trial docket, and that a new trial be granted, and when the case came on, upon the motion of the defendants, ordered the suit to be dismissed, because the defendants had not been duly served with notice as directed by law; *Held*, that this judgment was erroneous, and that the parties must proceed to trial upon the merits of the case.
3. The case of *Guion* v. *Shepard*, Conf. Rep., 26, cited and approved.

This was an appeal from the judgment of the Superior Court of Wilkes County, rendered at the Spring Term, 1841, his Honor Judge MANLY, presiding. The defendants had obtained a *certiorari* upon an affidavit, stating that they were the
(409) securities of one John J. Bryan, as Sheriff of Wilkes county; that one Benjamin F. Petty, (the present

plaintiff) the County Trustee, had caused a notice to be served on the said John J. Bryan alone, returnable to August Term, 1839, of Wilkes County Court, to shew cause why judgment should not be rendered against him and his sureties, for the amount of the taxes then in his hands; that judgment was rendered accordingly, at the said August Term, against the said John J. Bryan and these defendants, for the sum of fourteen hundred and six dollars, and costs of suit; that the defendants had no notice nor knowledge of the making of any such motion, and no means of defending the same; and that the said John J. Bryan was in embarrassed circumstances, and the defendants were likely to suffer. And the defendants, upon this affidavit, prayed for a *supersedeas* to the execution issued on the said judgment, and a *certiorari*, and that the said judgment might be reversed, and they have an opportunity of pleading to the said cause. The *certiorari* being returned to the Superior Court of Wilkes, at April Term, 1840, the following order was then made: "It is ordered by the court, that this case be transferred from the appearance to the trial docket, and that the parties be reversed, and new trial granted to Edmund Jones, &c. (the present defendants)." The cause was continued until April Term, 1841, when the following order was made: "It appearing to the court, that the defendants were not served with notice, as by law required, ordered that this proceeding be dismissed." From this judgment, the plaintiff appealed to the Supreme Court.

No counsel for the plaintiff.

D. F. Caldwell for the defendant.

GASTON, J. The writ of *certiorari* from the Superior to the County Court, as it has been moulded by judicial usages and legislative enactments, to suit the convenience of our citizens, issues ordinarily after a judgment, to correct some alleged injustice, which the party complaining has not had an
(410) opportunity of causing to be corrected by the ordinary remedy of appeal. When the record is brought up by this writ, the first enquiry in the Superior Court is, whether there shall be a re-examination of the matter, wherein the alleged injustice occurred. If this be decided in the negative, the *certiorari* is dismissed, and a *procedendo* awarded to the County Court to execute its judgment; but if it be decided in the affirmative, then the proceeding by *certiorari* becomes, as to the matter complained of, *that* for which it is substituted, an appeal, a trial *de novo* both as to law and fact is awarded in the Supe-

rior Court, and the judgment to be re-examined is, by such award, annulled. This is the light in which the *certiorari* was in this case originally regarded, both by the petitioners and the court to which it was returned. The application for the writ was made in behalf of such only of the defendants in the judgment, as felt themselves thereby aggrieved, and their prayer was that the judgment should be reversed, "and they have an opportunity of pleading to the said cause." And when, in obedience to the writ, the record was brought up to court, it was ordered that "a new trial be had, and that in the issue, the defendant to the *certiorari* should be the party plaintiff, and the petitioners the defendants." But at the subsequent Term, instead of proceeding to the trial of the merits involved in the issue, the petitioners prayed that the judgment below should be reversed *for error*, no further trial be had, and the parties dismissed from the court.

We think that the court erred in assenting to this prayer. The *certiorari* was not in the nature of a writ of error. It can operate as such, only where a writ of error does not lie, and we see no reason to doubt but that a writ of error might have been sued out to reverse the judgment in this case. A *general* jurisdiction is expressly conferred by statute on the Superior Court to grant writs of error, for correcting all errors of the County Court, and this grant of jurisdiction is limited only by the necessary and implied exception of those cases, wherein the errors of
(411) the Inferior Court cannot be corrected by such a writ. The judgment here complained of, was not one of those cases. It was rendered in a civil suit, *inter partes*, on a matter of right, to be judged of by the law common to both courts, and where the proceedings were to be in all respects according to the usages of the common law, except so far as the public statutes had interfered for expediting the process, pleadings and trial therein. It has not heretofore been questioned, we believe, that in such a case, any error to be found in the judgment of the County Court might be revised by writ of error. See *Guion* v. *Shepard*, Conf. Rep., 26. Besides, in a writ of error, where there is a common judgment, all against whom it is rendered must join, for an *entire* judgment cannot be reversed in part.

The final judgment in the court below must be reversed, and the cause remitted to that court, in order that a trial be had between the original plaintiff and the petitioners, as to their alleged indebtedness as the sureties of John J. Bryan.

PER CURIAM. Judgment accordingly.

WILLIAM A. MUZZELL *vs.* THOMAS L. LEE.

Upon what facts a *certiorari* will be refused, when the appellant from the Superior Court did not bring up his appeal.

The appeal in this case, which was allowed at Spring Term, 1841, of Caswell Superior Court of Law, not having been brought up within the time prescribed by law, *James T. Morehead*, counsel for the plaintiff, moved for a *certiorari*, to bring up the proceedings on the following affidavits, to-wit:

(412) John K. Graves maketh oath, that he is Clerk of the Superior Court of Law of the County of Caswell, that the plaintiff, in the above stated case, resides out of this State, that one of his counsel, to-wit, William A. Graham, had to leave immediately after court, for Washington City, and that the other, to-wit, James T. Morehead, lives at the distance of forty miles; that the appeal bond was filed at the court where the appeal was granted; that express directions were given by counsel for sending up the case, and the clerk promised to do so. And this affiant further states, that the transcript in the case was made out in time to reach Raleigh in the time required by law for filing appeals.

(Subscribed and sworn to in due form of law.)

Paul A. Harrison maketh oath, that he is Clerk of the Court of Pleas and Quarter Sessions of the County of Caswell; that he was at the Superior Court of Law held for said county, at May Term, 1841, and assisted the Clerk of the said Superior Court in the discharge of his duties in court; that upon the rise of court, (after the trial of the above stated cause, and the appeal to the Supreme Court was granted,) he was spoken to by James T. Morehead, Esquire, one of the counsel for the appellant, William A. Muzzell, to aid the clerk in making out the transcript to go to the Supreme Court, and was moreover further requested by the said counsel, to say to the clerk, that he (the counsel) wished the transcript to be made out as soon as he could do so, and forwarded on to the Supreme Court. This affiant further states that the plaintiff (the appellant,) resides beyond the limits of this State; and that one of his counsel is a United States Senator, and had to leave shortly after court for Washington City, and that the other resides at the distance of forty miles; that an appeal bond was filed at court, when the appeal was granted, and that express directions were given by counsel for sending up the case.

(Subscribed and sworn to.)

Edmund B. Freeman makes oath, that the record of the suit of *William A. Muzzell*, adm'r, v. *Thomas L. Lee*, Sheriff, reached his office, as he believes, on Tuesday morning,
(413) 22d June, and (if he is not mistaken in this,) it must have reached the post office in the city, the evening before. Affiant has mislaid the envelope which came around the said record, and therefore he cannot state at what time the said record was mailed. He says further, that although he believes the said record reached the clerk's office on Tuesday morning, it might have been Wednesday the 23d of June. He is certain it was not later than Tuesday or Wednesday.

(Subscribed and sworn to.)

PER CURIAM. The *certiorari* cannot be granted.*

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(414) STATE *vs.* ROBERT JONES & al.

1. The Legislature has a constitutional right to pass an act changing the location of the seat of justice of a county, although a contract for the purchase of a particular site had already been made by the commissioners appointed by law for that purpose.
2. Though a peremptory mandamus implies that the party has been fully heard, and, therefore, that he can allege no reason for not obeying it, yet an exception is of necessity implied, that such obedience is not forbidden by a new law, passed after the writ was awarded.

This was an appeal from a decision of his Honor Judge BAILEY, made at the Spring Term, 1841, of Buncombe Superior Court of Law. The facts of the case are sufficiently set forth in the opinion delivered by his Honor the CHIEF JUSTICE.

The Attorney General for the State.
No counsel for the defendants.

RUFFIN, C. J. The present question grows out of the same proceeding, which was before the court at June Term, 1840, in

*NOTE.—As cases like the present have frequently occurred, the Reporter thinks it may be useful to state, for the information of those who appeal to the Supreme Court, that the law requires the party appellant to file a transcript of the record in the office of the clerk of that court, within seven days after its term commences; that the terms of the Supreme Court being on the 2d Monday of June, and the last Monday of December, the transcript must be filed *not later* than the 3d Monday of June, and the 1st Monday of January, it having been decided that the seven days mean seven *judicial* days. If the party, or his agent, be guilty of neglect in this respect, he loses his appeal. It is not a sufficient excuse that the party has trusted to the clerk, or any other agent, to bring up his appeal. It is made by law the duty of the party himself, to see that his appeal is filed within the proper time; and the default of his agent, affects him as injuriously as his own personal default could.

which this court affirmed the judgment of the Superior Court of Buncombe, awarding a peremptory mandamus to Robert Jones, Asa Edney, John Miller, and Richard Allen, commanding them, with B. Wilson, E. Hightower, and John Clayton, to perform the duties, imposed by the 11th section of the act of 1838, of procuring by purchase or donation, a proper tract of land for the county town of Henderson county. 1 Iredell's Rep., 129. Upon receiving the certificate from this court, the Court of Buncombe issued the peremptory writ at October Term, 1840, returnable to April Term, 1841. In the meanwhile, the Legislature met in November, 1840, and passed an act, ch. 53, entitled "an act to fix the location of the town of Hen-

(415) dersonville;" and thereby enacted, that the location of the court house of Henderson county should be made by the qualified voters of that county; and, after prescribing the period and manner of holding the election, the act appoints other commissioners to carry into effect the decision by the popular voice, by procuring, by purchase or donation, not less than fifty acres of land, including the point designated by the voters, or within one mile thereof, and laying out thereon a town, in which the court house and other public buildings shall be erected. And then, amongst other things, it is expressly enacted, "that such of the existing laws, as come in conflict with the provisions of this act, are hereby repealed."

After the enactment of this statute, the commissioners to whom the mandamus was issued, declined proceeding further under it; and at April Term, 1841, the relators moved for an attachment against them. This was opposed upon the strength of the act of 1840. But on the other side, it was contended, 1st, That no plea could be received, nor excuse heard, for not obeying a peremptory mandamus; and 2ndly, That the act of 1840 was unconstitutional, as it violated the contract (as stated in the former case) made with Johnston, for land for a town site. The court refused the motion, and the relators appealed.

We concur in the decision of his Honor. If a definitive contract had been entered into between Johnston, and the persons appointed under the act of 1838 to contract for the public, yet it would be entirely competent to the Legislature to remove the seat of justice from that to any other place in the county. The designation of a place, in which the courts of a county shall be held, the mode of making the selection, and of appointing the persons to act on behalf of the public, in procuring or disposing of land for those purposes, or erecting the requisite buildings,

are matters of political arrangement and expediency, and necessarily, the subjects of legislative discretion. The Legislature is charged with the duty of providing for the public convenience, and the reasons, arising out of public convenience, may at one time be strong for holding the courts at one place, and, (416) at another time, at another place. It very often happens, indeed, that the effect on the value of private property forms a material consideration with the Legislature, in deciding on the question of change, and properly prevents any change not plainly demanded by the general welfare. Still, the Legislature is to judge of that; and, if the advantage of the community at large requires it, private interests must yield. The incidental consequences of the exercise of an useful and indispensable legislative power must be submitted to by every citizen.

It is true, that a peremptory writ of mandamus implies, that the party has been fully heard; and, therefore, that he can allege no reason why he has not obeyed it. But an exception is, of necessity, implied, that such obedience is not forbidden by a new law, passed after the writ was awarded. These persons were appointed to act as public agents in this matter, and the writ was to enforce the performance of that duty to the public. Now, the public has since revoked its authority, and taken away the power to act in the premises from them, and conferred it on other persons; and, therefore, it is impossible that the public can complain of their former agents, or punish them for not continuing to act.

PER CURIAM. Judgment below affirmed.

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(417) CHARLES GRIER *vs.* NATHAN FLETCHER & al.

1. An action may be sustained, under our act of Assembly, Rev. St., c. 31, s. 89, against any one or more of the joint obligors in a covenant of warranty, contained in a deed for the conveyance of land, for a breach of such covenant.
2. That act is not confined to contracts for the payment of money merely.
3. Persons owning land in common, and conveying it, need not be liable for each other in their covenants; as they may make several conveyances, or in the same deed may covenant severally each one for himself and for his share.
4. The case of *Smith* v. *Fagan*, 2 Dev., 298, cited and approved.

This was an action of covenant, tried at Spring Term, 1841, of Buncombe Superior Court, before his Honor Judge BATTLE. The covenant declared on, was a covenant for quiet enjoy-

ment, contained in a deed for land, executed by the defendants and several others, to the plaintiff. Several of the covenantors were married women, and, upon the trial, the deed appearing not to have been properly proved and registered as to them, the counsel for the plaintiff moved for leave to enter a *nolle prosequi* as to them and their husbands. A juror was thereupon withdrawn, and the *nolle prosequi* entered; and the defendants were then permitted to file a plea in abatement, *nunc pro tunc*, that the covenant was joint and single, and that the suit ought to have been brought against all the covenantors, or a single one only, and could not be sustained against two. To this plea, the plaintiff demurred and argued, that by the 89th section of the Rev. Stat., ch. 31, the suit might be sustained against any one or more of the covenantors; but the court, being of
(418) opinion that the act in question did not apply to cases of this kind, overruled the demurrer, and sustained the plea. The plaintiff thereupon appealed.

No counsel appeared for either party in this court.

RUFFIN, C. J. This is an action of covenant, brought against Nathan Fletcher, John Fletcher, Elizabeth Fletcher, and Jacob Rhodes, for the breach of a covenant of general warranty, contained in a deed of bargain and sale, made by them to the plaintiff. The defendants pleaded in abatement the non-joinder of James Fletcher, Elizabeth Rhodes, wife of the defendant Jacob, and John Pack and his wife Mary Pack, by whom also the deed was executed jointly with the defendants; and to this plea, the plaintiff demurred generally. The record contains an admission, that the *femes covert* had not been privily examined as to the execution of the deed by them; and also an agreement, that no objection should be taken to the form of the plea, but that it shall be sustained, if upon the facts, or any of them, a good plea could have been framed. It is not material, therefore, to consider the effect of the plea's embracing the married women, as having executed the deed when they certainly did not; since the deed was executed by James Fletcher and John Pack, and the plea must, under the agreement, be sustained, if those two persons ought to have been made defendants.

His Honor was of opinion, that the case was not within the Revised Statute, c. 31, s. 89, which authorises "in all cases of joint obligations or assumptions of copartners or others, suits to be brought against the whole or any one or more of the persons making such obligations, assumptions, or agreements;" but that

suit must be brought against all the covenantors, or against a single one only. The plea was therefore sustained, and a judgment given thereon for the defendants, from which the plaintiff appealed.

As the covenant is, according to its terms, joint and not joint and several, it would at common law have been necessary to sue all the parties, or all those living. It is however
(419) admitted by his Honor, and properly, as we think, that several actions would lie against each of the covenantors. This could only be by force of the act of 1789, c. 314, in the fourth section of which, it is provided, first, that a *joint debt or contract* shall survive against the heir or executor of a deceased obligor; and secondly, that on joint *obligations* or *assumptions* of copartners or others, suits may be brought in the same manner as if such obligations or assumptions were joint and several. It is true, that under the latter branch of that act, an action would only lie against one or all of the joint contractors, and not against any intermediate number of them. But it was corrected by the act of 1797, c. 475, s. 2, which forms the 89th section of chap. 31, of Revised Statutes, before quoted. That not only uses the words "obligations and assumptions," found in the act of 1789, but adds the broader term "agreements;" and provides that suits may be brought "against the whole or any one or *more* of such persons making such," that is, *joint* "obligations, assumptions or agreements." It is, thus, quite apparent, that this case is within the letter of the statute. Being so, the act must, we think, govern it. In interpreting it, we cannot stop short of the meaning, which is plainly imported by the language of the act. On the contrary, the acts of '89 and '97 have been looked on as being of the nature of statutes for the amendments of the law, and been construed with the liberality to which remedial statutes are entitled. Thus, in *Smith* v. *Fagan*, 2 Dev., 298, it was, in accordance with the previous decisions there cited, held, that a judgment, upon the death of one of the defendants, survived, not only against the other defendants, but also against the executor of him who died, and might be proceeded on against them all jointly. So, if one of these covenantors had died, the same principle would authorize a joint suit against the survivors, and the executor or heir of the dead one. It is for the benefit of the creditor and the surviving debtors, that it should be so, and, indeed, for the representatives of the deceased party also; since it is well to charge, at once and together, all those who may

be ultimately charged, and without the necessity of
(420) incurring the expense of separate actions. Now if the case thus fall within that branch of the act, which authorizes a joint action, where one of the obligors or covenantors is dead, it would seem it must fall also within the other, which allows an action against any one or more of the persons making "a joint agreement," omitting some of the parties. There is nothing in the nature of the thing, or in the objects of the acts, which should confine their operation to contracts for the payment of money merely. Agreements, generally, are mentioned; and there have been numberless actions, like this, brought on bonds with collateral conditions, or on joint covenants for the performance of specific things, other than the payment of money. If any covenant be within the acts, all must be; one being as much of an agreement as another. If persons owning land jointly, or in common, do not mean to be liable for each other, they need not be; as they may make several conveyances, or in the same deed may covenant severally, each one for himself and for his share. The judgment must be reversed, the demurrer sustained, and judgment of *respondeas ouster*.

PER CURIAM. Judgment accordingly.

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(421) ELIJAH CLARK, Adm'r of ANTHONY DAVIS, *vs.* ISAAC HELLEN.

1. The court has a discretionary power to permit an original writ to be amended, by adding to it the seal of the court, where that has been omitted before the writ issued.
2. The case of *Den ex dem. Purcell* v. *McFarland*, 1 Iredell's Rep., 34, cited and approved.

This was an action of replevin, returnable to Craven Superior Court of Law, Fall Term, 1840. At the Spring Term, 1841, the motion, from the judgment on which the appeal was taken by permission of the court, was made and allowed by his Honor Judge BAILEY. The following is the case transmitted to this court.

This was a motion made by the plaintiff, to affix the seal of the court to the writ of replevin, which had issued at the instance of the plaintiff, in his name, as administrator of Anthony Davis, dec'd, against the defendant in this case, to the County of Carteret, where the defendant resided. The plaintiff exhibited in evidence the writ of replevin, and the bond taken by the Sheriff of Carteret in executing said writ. It appeared in evidence, that

the writ was issued by the Clerk of Craven Superior Court, without affixing the seal of the court to the same, to the County of Carteret, against the defendant, where the defendant resided, and was returned to the October Term, 1840, of Craven Superior Court; that the defendant declined to appear by attorney or otherwise, or to file any pleas in the suit, but that he was present at this Term of said court, (April Term, 1841,) when this motion was made, and resisted the same. And it further appeared in evidence, that the defendant was notified by the plaintiff at the return Term of said writ, of his intention to move this amendment. His Honor, after hearing the
(422) argument of counsel on each side, upon these facts granted the motion, and ordered the Clerk to affix the seal of Craven Superior Court of Law to the writ of replevin. And from this judgment or order of the court, the defendant prayed his Honor for permission to appeal to the Supreme Court, which was duly granted.

James W. Bryan for the appellant, contended that the writ as it issued, was utterly null and void; that this case differed from those in which the court had permitted writs of execution on judgments to be amended by affixing the seal, because in the latter, there was something to amend by; in the former, nothing; and also, that the appeal here was not from a discretionary judgment, but from an error in point of law. And he cited the following authorities in support of these positions: *State* v. *Raiford*, 2 Dev., 214; Rev. St., c. 4. s. 23; *Finley* v. *Smith*, 4 Dev., 97; Rev. St., c. 31, s. 125; *Bank of Cape Fear* v. *Seawell*, 3 Dev., 279; *Weaver* v. *Cryer*, 1 Dev., 337; Ba. Abridg. title void and voidable; 3 Blac. Com., 273, 282; *Burt* v. *Jackson*, 3 Moore and Scott, 552; 2 Dowl., 747; *Wilson* v. *Joy*, 2 Dowl., 182; *Bender* v. *Askew*, 3 Dev., 150; 2 Dowl., 616; 3 *Ibid.*, 554, cited in 3d Chitty's Genl. Prac., 524; 18 Eng. Com. L. Rep., 115, 118; 3 Chitty's Genl. Prac., 74, 516, 522; 3 Dowl., 678, cited in 3d Chitty's Genl. Prac., 516; Bouvier's Law Dict. nullity, 196.

John H. Bryan for the plaintiff, relied upon the decisions of this court, in the case of *Den ex dem. Purcell* v. *McFarland*, 1 Iredell's Rep., 34, and the authorities there cited, contending that there was no difference in the power of the court, as to the amendment in this respect, of writs of execution and original writs.

DANIEL, J. It has been frequently decided in this court, that,

where the Clerk has omitted to affix the seal of his court to writs of executions issued out of the County, the same may be amended by his being directed to affix the seal, *nunc pro tunc.*

(423) The authorities are all collected in the case of *Den ex dem. Purcell* v. *McFarland*, 1 Iredell's Rep., 34. But it is said, this being an original writ, the same indulgence ought not to be allowed, and that in fact it is void. The answer is, and so is an execution void until it is sealed. It is further objected, that there is nothing to amend by. The answer is, that the writ is not defective; it only lacked authentication. The clerk knew whether he issued it; and, if true, the court possessed the means of giving it authentication as to the rest of the world, by stamping it with the seal of the court. The Revised Statutes (c. 58, s. 1,) declare, that the court, in which any action shall be pending, shall have power to amend any *process*, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment. This act is very broad, and we think covers this case. The judgment must be affirmed, and this opinion certified accordingly.

PER CURIAM. Ordered accordingly.

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(424) STATE *vs.* JAMES STANTON.

1. On the trial of a bill of indictment for forgery, the person, whose name is charged to have been forged, and whose interest, supposing the instrument to be genuine, is affected by it, either as an obligation or acquittance, is not, while the instrument remains in force, a competent witness to prove the forgery.
2. Where a defendant is acquitted upon one count in an indictment, and convicted on another, and appeals, if a *venire de novo* be awarded, it must be to re-try the whole case.
3. In an indictment under the act of Assembly, Rev. St., c. 34, s. 21, for "shewing forth in evidence" a forged instrument, although "the shewing forth" must be proved to have been in a judicial proceeding, yet it is not necessary to state in the indictment in what suit or judicial proceeding it was "shewn forth." It is sufficient to state the charge in the words of the act of Assembly.
4. It is generally proper and necessary to describe in an indictment an offence, created by statute, in the words of the statute. But there are a few exceptions to this rule.
5. The cases of the *State* v. *Britt*, 3 Dev., 122, and *State* v. *Johnson*, 3 Dev., 360, cited and approved.

This was an indictment for forgery, tried at Spring Term, 1841, of Johnston Superior Court of Law, before his Honor

Judge SETTLE, and brought up to this court, on appeal by the defendant, from the judgment of the court. The indictment was in the following words, viz:

State of North Carolina, } Superior Court of Law,
Johnston County. } Fall Term, 1839.

The jurors for the State, upon their oath present, that James Stanton, late of the County of Johnston, in the State of North Carolina, on the twenty-eighth day of May, in the year of our Lord, one thousand eight hundred and thirty-nine, with force and arms, in the County of Johnston aforesaid, feloniously did wittingly and falsely forge, make and counterfeit, and did cause and procure to be falsely made, forged and counterfeited, and did willingly act and assist in the false making, forging and
(425) counterfeiting, a certain receipt, which said false, forged and counterfeited receipt is as follows, that is to say, Received of Jas. Stanton, thirty-five dollars and ninety-one cents, this 22d day of May, 1838, in part of the rent of land that I rented to him for the year 1837.

W. WHITTEY.

with intention to defraud one Willie Whittey, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

And the jurors aforesaid, upon their oath aforesaid, do further say and present, that the said James Stanton, afterwards, to-wit, on the day and year aforesaid, in the County of Johnston, aforesaid, feloniously did utter and publish as true, and shew forth in evidence, a certain other false, forged, and counterfeited receipt, which said last mentioned false, forged and counterfeited receipt is as follows, that is to say, Received of James Stanton, thirty-five dollars and ninety-one cents, this 22d day of May, 1838, in part of the rent of the land that I rented to him for the year 1837.

W. WHITTEY.

with intention to defraud the said Willie Whittey, he, the said James Stanton, at the time he so uttered and published, and shewed forth in evidence the said last mentioned false, forged and counterfeited receipt as aforesaid, then and there well knowing the same to be false, forged and counterfeited, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

J. R. J. DANIEL, Attorney General.

To this indictment, the defendant pleaded not guilty. On the trial, Willie Whittey, who had signed the receipt, which was charged to have been altered, was offered as a witness in support of the prosecution. He stated, that he held the obligation of the defendant for thirty-five dollars, given for rent of a tract of land for the year 1837; that the defendant had paid him ten dollars in part of his obligation, for which the receipt, alleged to have been forged, was given; and that he had warranted the defendant for the balance; that this warrant had been tried before a magistrate, and judgment given against him for the costs, from which judgment he had appealed to the County Court,
(426) where the matter was still pending. The counsel for the defendant then objected to the competency of this witness. The court overruled the objection, and admitted the witness to be examined as to the receipt, reserving the question on a motion for a new trial, should the defendant be convicted. The witness proved the execution of the receipt for ten dollars, and that it had been altered as it now appeared, since he signed it; that it was in its present state when he first saw it, after its execution, in the possession of the defendant, who exhibited it on the trial before the magistrate. The justice before whom the warrant was tried, was also examined as a witness for the State. He testified as to the warrant, the trial, and the offering of the receipt by the defendant. The jury found the defendant not guilty on the first count, but guilty on the second count, as charged in the indictment. A rule was granted on the Attorney General, to shew cause why a new trial should not be granted, on account of the admission of improper evidence; and a motion was also made in arrest of judgment. His Honor discharged the rule for a new trial, and intimated an opinion in favor of the motion in arrest of judgment. But he said, as it was important to have both questions settled, he should disallow the motion and give judgment, *pro forma*, against the defendant. From this judgment, the defendant appealed to the Supreme Court.

J. H. Bryan for defendant. The rule to exclude as incompetent, on the trial of an indictment for forgery, the testimony of him whose obligation or acquittance was alleged to be forged, is a well settled rule of the common law. Rosc. on Crim. Ev., 105, 409. 2 East's Crown Law, 993. It required an act of Parliament to alter it in England, as late as 9th Geo. 4th.

2ndly. It was not sufficient to set forth in the second count generally, that defendant *shewed forth the receipt in evidence, &c.*,

it should have been stated *how, when and where* the receipt
(427) was *shewn forth;* before what judicial tribunal, and in what judicial proceeding. The court ought to be able to see from the indictment itself, that the instrument was offered in evidence before a competent judicial tribunal. *State* v. *Fitzgerald*, 1 Dev. & Bat., 408; *State* v. *Britt*, 3 Dev., 122; *State* v. *Baldwin*, 3 Dev., 197; *State* v. *Enloe*, 4 Dev. & Bat., 376.

Attorney General in reply, contended as to the 1st point, That the same rule should apply in this case, as in analogous cases; that the true criterion in regard to the interest necessary to render a witness incompetent was, that the verdict might be given in evidence for or against him. And he cited Hawk., 646; 4 Blac., 330; *State* v. *Hassett*, Tay., 55; Phil. Ev., 38, 39, 43; *State* v. *Coulter*, 1 Ha., 3; *Farrel* v. *Perry*, 1 Hay., 2; *Porter* v. *McLure*, 1 Hay., 360; *State* v. *Wyatt*, 2 Hay., 56; Archbold on Crim. Plead., 146, 147; *King* v. *Newland*, Leach, 311; *King* v. *Ponsonby*, Leach, 322; *King* v. *Waite*, 1 Bingh., 121; *King* v. *Peacock*, Ry. & Rus., 278; *King* v. *Mott*, Ry. & Rus., 436; Phil. Ev., 88, 89, 90; *People* v. *Howard*, 4 Johns. Rep., 296, 302, 303.

2ndly. As to the motion in arrest of judgment, he insisted that the second count in the indictment was sufficiently certain; that it contained enough to disclose to the defendant the offence with which he was charged; that the words "shew forth in evidence" had been judicially defined in *State* v. *Britt*, 3 Dev. 122, and that certainty to a common intent was sufficient. 1 Chit. Crim. Law., 236, 239; Russell on Crimes, 406; Archbold Crim. Pl., 44, 54.

RUFFIN, C. J. It has not been denied in the argument, that at common law it was a settled rule of evidence in England, that a person, whose name had been forged, and whose interest supposing the instrument to be genuine, was affected by it, either as an obligation or acquittance, was not, while the instrument remained in force, a competent witness to prove the forgery. Gilb. Ev., 124; Phil. Ev., 88; 2 Strange, 728; 2 East's P. C., 993. But it was said in the argument, that the rule was origi-
(428) nally adopted upon the notion, now admitted to be erroneous, that the witness would, by procuring the conviction of the accused, be discharged himself; and thence it was urged that we should not enforce the rule itself. Certainly parties injured are generally competent to prove the crime. But the case of forgery, though an anomaly, is certainly an exception. Although it may have been admitted inadver-

tently, and upon a wrong principle, yet as a court administering the common law, we have no authority to abrogate a rule or an exception so perfectly settled in that law. In England, the courts, though not satisfied with it, could not alter the rule; and it became necessary for the Legislature to interpose. St. 9, Geo. 4, c. 32. In like manner, we think legislative authority is alone competent here to change the law, which our ancestors brought with them upon their emigration, and which became as obligatory on the judicial tribunals they established, as it continued to be on those they left behind. Besides, there have been, as it is well known, many cases in which such witnesses have been held incompetent in this State, and we feel bound not to depart from them; and therefore deem the judgment erroneous and reverse it.

As this is done at the instance of the prisoner, the former verdict must be set aside entirely, and a *venire de novo* awarded, to re-try the whole case.

Upon the form of the indictment, the court would perhaps not be bound now to decide, since the other point disposes of the case here. But as the point may be material upon the next trial, and would, probably, soon arise in other cases, we deem it fit to state the opinion we have formed on it, with the view of settling the question. It would have been more satisfactory to us, if in the books of criminal pleading or in an adjudication, a precedent or a direct authority could have been found. We have, however, looked through the standard works on crown law, from Ld. Coke's commentary on the statute, 5 Eliz., c. 14, in the third institute, down to Mr. Chitty's treatise, and through many books of forms, without succeeding in finding an indictment upon these words in that statute, "shew forth in evidence," or a rule laid down upon them. This circumstance may not perhaps be deemed so very singular, when it is remembered that the same
(429) act contains also the words, "pronounce and publish," which are more extensive, and include "shew forth in evidence." This furnishes a reason why the indictment should always be for "pronouncing and publishing," and none for "shewing forth in evidence;" since, although every publication is not shewing forth in evidence, yet shewing it forth in evidence is a publishing of it: Lord Coke saying that using any words, written or oral, whereby the instrument is set forth or held up as true, is "to pronounce and publish it." We have therefore only principle for our guide, and, being so guided, we have arrived at the conclusion that the second count is sufficient.

In the first place, we adhere to *Britt's* case, 3 Dev., 122, that the words "shew forth in evidence," refer to a judicial proceeding. The question then is, whether the particular proceeding must be set forth at large in the indictment; or may not be shown on evidence under the general words used in the statute and in this indictment.

It seems to be proper, and perhaps may be said to be necessary, where an offence is created by statute, to describe it in the indictment, whether consisting of the commission or omission of particular acts or of certain acts accompanied by a particular intent, in the words of the statute. This is certainly so, unless, for a word or phrase in the statute, another is used in the indictment, which is clearly of the same legal import, or has a broader sense including that in the statute. Of this exception, *Rex* v. *Fuller*, 1 Bos. & Pul., 180, is an example. But such examples are very rare; and on the contrary, the case of *Rex* v. *Davis*, Leach, 493, and others of that kind, shew how strictly the courts adhere to the letter of the law. Finding it thus to be generally true, that in describing the offence, the indictment must use all the words of the statute: so, on the other hand, it would seem to be equally true, as a general rule, that the indictment is sufficient, if it contain all the words of the statute. When the language of the statute is transferred to the indictment, the expressions must be taken to mean the same thing in each. There can be few instances, in which the same words thus used, ought to or can be received in a different sense in the
(430) one instrument from that in the other. As it is certain that the indictment was intended to describe the offence which the statute describes, it follows, from the use of the very same language in both, that the one means what the other does; neither more nor less. It is true that some few exceptions from this rule have been established by adjudications; but they have not appeared to us to embrace the present case. Thus, a statute may be so inaccurately penned, that its language does not express the whole meaning the Legislature had; and by construction, its sense is extended beyond its words. In such a case, the indictment must contain such averments of other facts, not expressly mentioned in the statute, as will bring the case within the true meaning of the statute; that is, the indictment must contain such words as ought to have been used in the statute, if the Legislature had correctly expressed therein their precise meaning. In *State* v. *Johnson*, 1 Dev., 360, for example, it was held, that besides charging in the words of the act, that the

prisoner, being on board the vessel, concealed the slave therein, the indictment should have charged a connexion between the prisoner and the vessel, as that he was a mariner belonging to her; because that was the true construction of the act. So, where a statute uses a generic term, it may be necessary to state in the indictment the particular species, in respect to which the crime is charged. As, upon a statute for killing or stealing "cattle," an indictment using only that word is not sufficient, but it ought to set forth the kind of cattle, as a horse or a cow. *Rex* v. *Chalkeley*, R. & R., 258. But where a statute makes a particular act an offence, and sufficiently describes it by terms having a definite and specific meaning, without specifying the means of doing the act, it is enough to charge the act itself, without its attendant circumstances. Thus, upon a statute making it felony to endeavor to seduce a soldier from his duty, an indictment is good, which charges such "an endeavor," without stating the mode adopted. *Fuller's* case before cited. So, in indictments founded on the words "pronounce and publish," in this same statute of Elizabeth, (which are not ours), the (431) precedents uniformly charge "the pronouncing and publishing of the forged instrument as true," without stating the means by which, or the person to whom it was published. Upon the more modern English statutes against "putting off or disposing of" forged or counterfeit money or bank notes, it is also held, that the circumstances need not be stated. *Rex* v. *Holden & al.*, 2 Taunton, 334. We do not perceive why the same principle does not apply to the other words, "shew forth in evidence," used in the act of Elizabeth, and in our act; and are not aware of any disadvantage to the prisoner from the omission to set out in the indictment the particular proceeding, in which the evidence was offered. We agree that such a judicial proceeding must be proved; and if it be not properly proved, the prisoner can put the matter on the record by an acception, and have the same benefit thereof on a motion to reverse the judgment, and for a *venire de novo*, that he could have from a motion in arrest of judgment. Hence, we hold the second count in this indictment to be good.

PER CURIAM. New trial awarded.

(432) MARTIN WOOLARD *vs.* M. H. MCCULLOUGH.

1. The common law mode of creating and establishing a public highway, is not repealed by any of our acts of Assembly.

2. The *user* of a road as a public highway, for twenty years, will, under the circumstances of this case, authorize a jury to presume a dedication of the road by the proprietors of the soil to the public use.
3. Where a road is opened by an order of the County Court, according to law in every respect, except that no damages were assessed by the jury to the owners of the land, none but those owners can impeach the order for that cause.
4. An overseer of a public road can require no hands to work on his road, unless they live within a district which has been designated for him by the County Court, or unless they have been specially assigned by the court to work on his road.

This was an appeal from the decision of his Honor Judge BAILEY, made at Spring Term, 1841, of Beaufort Superior Court of Law. The case as transmitted to the Supreme Court was as follows:

This was an action commenced by warrant, before a single magistrate, to recover several penalties for not working on the road. On the trial it appeared, that at March Term, 1838, of Beaufort County Court, the plaintiff was appointed overseer of a road leading from the town of Washington, to the Martin county line; that he had duly summoned the defendant to work on said road, at several different times, being ten days in all, for himself and his two hands, in the year 1838; that defendant had sent two of his slaves to work on said road in question, one day during that year. In order to prove the road in question a public road, the plaintiff introduced a petition from the records of the County Court of Beaufort, signed by sundry citi-
(433) zens of said County, filed at February Term, 1835, a copy of which, with the other proceedings in the case, is herewith annexed, and made a part of this case. The plaintiff introduced witnesses, who proved that more than twenty years ago, the road from Washington for about six miles (the whole distance from Washington to the Martin line was proved to be about eight miles), was reputed a public road, and worked on as such, near which part the defendant lived; the rest of the distance was a forest. In order to prove the liability of the defendant to work on said road, the plaintiff introduced witnesses, who proved that the defendant resided, in a direct line, about a mile from the nearest point of said road, which at this point was the nearest public road to the defendant, if this is a public road; that the defendant resided within about a mile and a half of another road, which was reputed to be a public road. It was further proved, that, for more than fifteen years, the persons, who successively occupied the premises now occupied by the defendant, had worked on so much of said road as was then opened. It was also proved,

that on one occasion the defendant had told the plaintiff that he would make compensation for the failure of his slaves to work on said road. Upon this proof, the defendant prayed his Honor to instruct the jury that it was necessary to prove the road in question to be a public road, and that it had not been proved; that, supposing it to be a public road, the defendant was not liable to work on it; also, that, if any part of said road was not a public road, they should find for the defendant, because the charge was for not working on the whole road. This instruction his Honor refused; but charged the jury that the petition, report of the jury, and orders made by the County Court, were sufficient in law to constitute it a public road; that if the defendant had worked upon the road and lived within a mile of the same, and nearer thereto than to any other, and had received due notice to work upon the same, he was liable for neglecting or refusing to work, although the County Court of Beaufort had not assigned him to work on the same. The jury returned a verdict for the plaintiff. A rule for a new trial was obtained, which
(434) rule was discharged, and a judgment rendered for the plaintiff, from which the defendant appealed.

The documents appended to the case, being extracts from the records of Beaufort County Court, were as follows: 1st. A petition at March Term, 1803, from sundry inhabitants of that County, praying for a road from the town of Washington, in the course of Broad street, "till it strikes the main road which passes by Henry S. Bonner's, and farther, if the jury think proper:" an order thereon for the Sheriff to summon a jury, "to alter the road from the fork of the said road leading from Washington to Jamestown," so as to run "round the fence of Charles Cherry, Sen'r," which the Sheriff returned "Executed," and an order of the court that a road be run and laid, agreeable to the petition, &c., and that J. C. and others be appointed jurors to attend the surveyor, &c., which order was returned by the Sheriff "Executed."

2dly. At September Term, 1807, of said court, an order issued to the Sheriff of said County, to summon a jury "to extend the new road from the hill at Edward Bonner's so as to strike the Jamestown road in the most direct route," which was returned by the Sheriff, as follows: "Jury summoned and met on the ground; after being duly sworn, proceeded and laid off the road as here required, as will fully appear by their return to court of the same, under their hands." The only return exhibited, was an indorsement on the back of the Sheriff's, of the names of the jurors.

3dly. A petition at February Term, 1835, of sundry inhabitants of said County, praying that a road might be established "from Hawkins' bridge, adjacent to the town of Washington, to intersect the Jamestown road leading by, &c.," (mentioning the names of the owners of land on the route.) Upon which the following order was entered: "On motion of the court, and proof of said petition being made public, and notice given, it is ordered that the said road be altered and changed, so as to run in a straight line from the town of Washington, to the place where it strikes or arrives at the Jamestown road, and that a jury be summoned by the Sheriff of this county, to so run and lay off the same, and make report to the next court,
(435) under a *venire*, &c.;" to which order and *venire*, the Sheriff and jury made the following return: "We, the undersigned jurors, summoned by the Sheriff for the purpose of altering the road running from Washington to Jamestown road, proceeded to alter and turn said road, and run with the old road as it was laid out before, and then a straight line to the swamp, and through the swamp a direct course to the Martin County line, through the plantation of Martin Woolard." Signed and sealed by the jurors. The Sheriff returned as follows: "In pursuance to the annexed order, I have summoned a jury, and first having had the same duly sworn, they laid off and altered the road as above stated, April 3d, 1835." Signed by the Sheriff. At April Term, 1835, of said court, the following order is entered: "On proof of advertisement made and ordered, it is ordered by the court, upon hearing the report of the Sheriff and jury, made on laying off said road, that said report is deficient in not valuing the damage, if any, sustained by the proprietors, through whose land said road is to run, and that the said report be re-committed to the Sheriff for amendment; or that a new order to said Sheriff to lay off said road again, and assess the damages to the proprietors, if any, on proof of advertisement made as ordered, that the road be layed off as prayed for." Another order at the same Term, in the following words: "On proof of advertisement made as ordered, it is considered by the court, upon hearing the report of the Sheriff and jury, made on laying off the road, that said report is deficient, in not valuing the damage sustained, if any, by the proprietors, through whose land said road is run; and that the said report be re-committed to the Sheriff." Upon this order, there was no return made by the Sheriff. At July Term, 1835, of said court, the following order was made: "Ordered that the report made to the last Term be confirmed."

J. H. Bryan for the plaintiff.
No counsel for the defendant.

DANIEL, J. The first question to be decided in this
(436) case is, whether the proofs offered were in law sufficient to establish the way to be a highway or public road. We will begin by remarking, that the common law mode of creating and establishing a public highway, is not repealed by the first section of our road law, nor by any other act of Assembly. Six miles of the road had, for more than twenty years, been reputed to be, and had been used as a public road. This evidence was sufficient, in our opinion, to go to the jury for them to presume the fact, that the way had been dedicated to the public as a highway, by the proprietors of the land over which it ran. With respect to a claim of highway, in the words of HALE, C. J., "much depends on common reputation." 1 Vent., 189. And if the owner of land permit the public to pass and repass over his soil, and use it as a public highway, without molestation, or any assertion of his rights for some time, the law will presume a dedication of the way to general use. Much discussion has arisen as to the period which must elapse, before such a dedication will be presumed. Woolrich on Ways, 9 to 14. *Jarvis* v. *Deans*, 3 Bingh., 447. We think, however, that twenty years *user*, under such circumstances as those stated in this case, will authorize a jury to presume a dedication. The two remaining miles of road were opened agreeable to law, with the single exception, that the jury did not assess damages to the proprietors, over whose lands the road run. This error, however, is not one of which the defendant can avail himself in this collateral way. The proprietors might complain, but third persons cannot. And *non constat* but that the proprietors may have abandoned their claims to damages, before the order confirming the report of the jury had been made by the court.

Secondly; Was the defendant liable to be summoned to work on this road? The act declares, (Rev. St., c. 104, s. 10,) "that it shall be the duty of the overseers of the public roads, to summon all white males between the ages of eighteen and forty-five,
and free males of color, and slaves, between the ages of
(437) sixteen and fifty, *within their districts*, &c." The Legislature has put the public roads, and the overseers of the same, mainly under the supervision of the County Courts; and although the act has not said expressly how the overseers' districts are to be laid off, or by whom they are to be established, yet it seems to us but fit and proper, and the Legislature must

have so intended it, that the courts which were entrusted with the general supervision of the highways, should be clothed with the power of laying out the overseers' districts, Great disputes and disturbances in neighborhoods will be prevented by this construction of the act. The general, though not universal practice through the State, as we learn, has been in accordance with this opinion. The plaintiff was an overseer without hands; he should have made application to the County Court for a list of hands, or an assignment of a *district.* The defendant's hands had never been assigned to that road; his lands were not comprehended by the court in a district of the defendant, as overseer of the said road. We therefore are of the opinion, that the judge erred in his charge on this point of the case, and that there must be a new trial.

PER CURIAM. New trial awarded.

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(438) JEREMIAH CHERRY *vs.* MARTIN WOOLARD.

1. Where a Sheriff or other officer sells under a valid execution, it is no objection to the title of the purchaser, that, in his deed of conveyance, he misrecites the execution.
2. Where a Clerk issued an execution, tested on the 5th Monday after the 4th Monday of September, in the year of our Lord, 1833, and in the 57th year of our independence, and indorsed thereon that the execution actually issued on the *5th of February*, 1833, and the Coroner also endorsed that it was levied on the 21*st of February*, 1833, the court must see that the dating of the writ, as to the *Christian era*, was a misprision of the Clerk, and will correct it accordingly.
3. The cases of *Den ex dem. Hatton* v. *Dew*, 3 Mur., 260; *Goodman* v. *Armistead*, 4th Hawks, 19, and *Dowell* v. *Vannoy*, 3 Dev., 43, cited and approved.

This was an action of trespass *quare clausum fregit*, tried at the Spring Term, 1841, of Beaufort Superior Court, before his Honor Judge BAILEY. On the trial, it became necessary for the plaintiff to shew title in himself, to the *locus in quo.* In deducing his title, he gave in evidence a judgment against one Stephen Owens, obtained at Fall Term, 1832, of the Superior Court of Beaufort County, an execution issued thereon to the Coroner of Beaufort County against Stephen Owens, who was then Sheriff of that County, a levy on the land in question and a sale by the Coroner to Benjamin Runyun, who received a conveyance from the Coroner, and then conveyed to the plaintiff. The teste of the execution was as follows: "Witness, James B. Ellison, Clerk of said court, at office, the fifth Monday after the fourth Monday of September, 1833, and the 57th year of

our independence." Signed by the Clerk. And the indorsement of the Clerk on the writ, as required by law, was "Issued 5th day of February, 1833." The levy of the Coroner indorsed on the execution, was dated, "February 21st, 1833."
(439) The Coroner's deed of conveyance recited a sale under an execution, against Stephen Owens, corresponding as to amount with the judgment above mentioned, but "returnable to Spring Term, 1833." The defendant objected, that the execution set forth in the Coroner's deed, did not correspond with the execution levied upon the land, which objection his Honor overruled, and under the instruction of the court, the jury returned a verdict for the plaintiff. There was a rule for a new trial, which was discharged, and judgment rendered for the plaintiff, from which the defendant appealed.

No counsel appeared for either party in this court.

GASTON, J. The objection, taken on the trial to the derivation of title on the part of the plaintiff, is because of a supposed discrepancy between the execution, recited in the Coroner's deed, and the execution, under which the Coroner made the levy and sale. This objection presupposes and admits, that the officer had a valid authority to sell, but insists that his deed was invalid to convey the land sold, because in the deed his authority was inaccurately recited. The question presented by this objection, is not with us an open question. The objection was deliberately considered by this court, in the case of *Den on dem. Hatton* v. *Dew*, 3 Mur., 260, and overruled. His Honor, therefore, properly overruled it in this case.

But upon a comparison of the execution recited in the deed, with that under which the officer sold, as they are both set forth in the transcript, the alleged discrepancy will be found not to exist. The execution under which the officer sold, is tested the 5th Monday after the 4th Monday of September, in the year of our Lord, 1833, and in the 57th year of our independence, and is made returnable to the term of said court, to be held on the 5th Monday after the 4th Monday of March next. *This*, it is said, must be the 5th Monday after the 4th Monday of March, 1834, whereas, the Coroner's deed recites the execution as returnable on the 5th Monday after the 4th Monday of March, 1833.

But it is manifest that there is a clerical misprision in
(440) the date of the execution, with respect to the year of the *Christian era*. This appears not only from the year of independence thereunto subjoined, but from the indorsation of

the Clerk, that the execution actually issued on the 5th day of February, 1833, and of the Coroner, that it was levied on the 21st of February, 1833. The cases of *Goodman* v. *Armistead*, 4 Hawks, 19, and *Dowell* v. *Vannoy*, 3 Dev., 43, are authorities to shew that such a misprision will be corrected by these *indicia* of truth. Thus corrected, the execution is tested of the Fall Term, 1832, and the deed truly represents it as returnable to the Spring Term, 1833.

PER CURIAM. Judgment affirmed.

HENRY COBB *vs.* HENRY FOGALMAN.

Although it is not easy in practice to draw the boundary between a defect of evidence and evidence confessedly slight, yet, where no part of the testimony offered can fairly warrant the inference of the fact in issue, or furnish more than materials for a mere guess or conjecture thereon, it is error in the court to leave it to the jury to infer the fact from such testimony.

This was an action of deceit, tried before his Honor Judge PEARSON, at the Spring Term, 1841, of Guilford
(441) Superior Court. Plea, "The general issue." The fraud complained of, was alleged to have been committed in the sale of a female slave, named Sally, who, at the time of the sale, labored under cancer or other disease of the womb, which was concealed by defendant. The plaintiff produced a bill of sale in the hand-writing of the defendant, executed by the defendant to him, for the said slave, and her daughter Hannah, about four years old, dated June 11th, 1838, containing a warranty of title, but not of soundness, and proved that the price given was a fair one. He also offered evidence, to shew that said slave Sally, while in possession of the defendant, had borne, after the aforesaid child Hannah, two children, at different times, which were either born dead, or survived but a short time; that at the time of sale, she was advanced in pregnancy about six months; that on several occasions, soon after the purchase by plaintiff, she was attacked with faintness when working in the harvest field of the plaintiff, and in August thereafter, was taken in labor, when, after an interval of about thirty-six hours, a physician was called in, who performed the Cæsarean operation, delivered her of a child, which he testified was then recently dead, and that the mother died about five or six days thereafter. He also testified, that from examination, he found the neck of the womb diseased with cancer or *sarcomatous* tumor, which rendered a natural delivery impossible, and that, in his opinion,

the disease had existed for several years; but that its symptoms were not distinguishable from those of pregnancy. The plaintiff also produced evidence, to shew that the slave had attacks of faintness, while in the defendant's possession; that defendant admitted this to the plaintiff, after the death of the slave, and said they occurred while she was pregnant; and when asked, why he did not tell the plaintiff of the dead children, as if he had known it he would not have bought her, he said he had forgotten it. It was also in evidence, that at the time of sale, defendant had no other female slave, except a girl about 14 years old. The defendant offered evidence, to shew that he had owned the slave Hannah about four years; that she was a stout,
(442) vigorous looking woman, and, during all the time he owned her, performed service as a cook and washer-woman for his family, or as a field hand; and was on no occasion prevented from service by sickness, except by an attack of measles, and during her confinement with the three children spoken of by the plaintiff's witnesses; that in the opinion of other physicians, a womb, diseased as that of this woman was described to be, was incapable of impregnation; and that no physician could tell from examination of the womb, how long it had been diseased. He also produced evidence, to shew that the plaintiff, about a month before the sale aforesaid, bought a negro man, the husband of Sally, and who had been her husband all the time that the defendant owned her; that the plaintiff owned no other slave, except a small boy; that the plaintiff came twice to the house of the defendant, to chaffer about the purchase of the woman, before she was taken away; that messages were carried between him and the defendant, by the negro man aforesaid, on the subject of the trade, but their import was not shewn; that the plaintiff said, the reason why he wished to purchase her was, that he owned the husband, and that his daughters did not like to wash for the negro man; that, on one of his visits to the house of the defendant as aforesaid, the plaintiff asked permission to have a conversation with Sally, and had a short interview accordingly, the defendant not being present. The defendant lived in Orange, and the plaintiff in Guilford county, about 15 miles apart.

It was admitted in argument, and so laid down by his Honor, that the plaintiff, in order to recover, must satisfy the jury, 1st. That the unsoundness of the negro existed at the time of sale. 2dly. That the defendant knew or had reason to believe its existence at the sale. 3dly. But if these facts were proved, if the

plaintiff also knew of the unsoundness at the time of the sale, or had reason to believe its existence, or there was sufficient ground to put an ordinary man upon enquiry, either by disclosures made by the defendant or in any other way, the plaintiff would not be entitled to recover. But in this case, there was no evidence that the defendant had made any disclosure, there was no evidence that the plaintiff could by ordinary inspec-
(443) tion (such as a practitioner in medicine was presumed or required to have), have detected the unsoundness, and the jury were not at liberty to infer, either that the negro woman or her husband, plaintiff's slave, had informed the plaintiff of its existence, as the plaintiff's counsel had contended, the slave being treated by his master with great kindness and familiarity, or to infer that the negro woman and the negro man had concealed the fact from the plaintiff, as he was desirous for his master to purchase his wife. Whether the disclosure was made by them or not, was a mere matter for guessing, and the court thought proper to charge the jury, that if the negro was unsound and the defendant knew it, the plaintiff was entitled to a verdict, as there was no evidence that the plaintiff knew of the unsoundness, or was put on his guard.

A verdict being rendered for the plaintiff, a new trial was moved for, on the ground of the verdict being against evidence and for misdirection, which was refused. Judgment being thereupon rendered for the plaintiff, the defendant appealed to the Supreme Court.

James T. Morehead & W. H. Haywood, jr., for plaintiff.
Waddell & Iredell for defendant.

GASTON, J. The case made for the consideration of this court, sets forth the evidence given on the trial, and the Judge's instructions to the jury, with respect to the application of that evidence to the decision of the issue, which they were impannelled to try. It does not state any specific instructions prayed, or exceptions to those instructions taken, by either party, and we have therefore no other means of ascertaining whether the law was correctly administered, than by a comparison of the evidence with the instructions.

With the positions of law laid down by his Honor, as abstract positions, no fault can be found. To enable the plaintiff to recover, because of a deceit, it was necessary to establish the existence of the alleged defect at the time of the sale, and a knowledge or belief of its existence on the part of the vendor,

and even if these facts were established, the plaintiff could not recover, if he, at the time of his purchase, knew or (444) had reason to believe that the defect existed. If he knew of the defect, or was cautioned against it, he was not deceived. And if the vendor knew it not, or suspected it not, he was not guilty of imposition.

We hold too, that the Judge was warranted in instructing the jury, that, if the defect in question existed at the time of the purchase, there was *no evidence* that the purchaser then knew or had been informed of this defect. It was indeed possible, that he might have acquired such information in his private conference with the negro woman, or from communications from her husband. But where the law does not presume the existence of a fact, there must be proof, direct or indirect, before the jury can rightfully find it; and although the boundary, between a defect of evidence and evidence confessedly slight, be not easily drawn in practice, yet it cannot be doubted that what raises but a possibility or conjecture of a fact, never can amount to legal evidence of it. Our difficulty, however, lies in *this*, that while the jury were explicitly instructed, that upon the testimony given in, there was no evidence, upon which they could infer that the plaintiff was apprized of the defect at the time of his purchase, it was left to them, as a question depending upon the weight of evidence, whether the defendant had or had not knowledge thereof before he sold. We have carefully examined all the testimony stated, and we are unable to lay our hands upon any part of it, which can fairly warrant the inference of such knowledge, or furnishes more than the materials for a mere guess or conjecture thereon. It was indeed for the jury to determine, whether to rely on the judgment of the medical gentleman, who was of opinion that the disease had been of many years duration, or on that of the other learned gentlemen, who pronounced that it could not have pre-existed the woman's pregnancy. On this point, there was evidence on both sides, and it was for the triers of the fact to compare and weigh this evidence. But admitting the existence of the disease previously to the sale, what proof was there, direct or inferential, that the defendant knew of it or suspected it? Not one symptom of the disease is shewn (445) to have occurred, while the woman was in his possession, which could have indicated its existence, even to the members of the medical profession. "The symptoms were not distinguishable," (such are the words of the doctor who attended the poor woman in her last delivery) "from the symptoms of

ordinary pregnancy." How, then, from any of these symptoms could it be inferred, that any person, either the sufferer herself or her master, had discovered the latent disease? Even the materials for a *guess* or *conjecture* were not furnished by the occasional attacks of faintness, which she had *while in a state of pregnancy*, and no other indications of a want of health at any other time than during pregnancy, are alleged to have existed. But she had borne two children since the one, then four years old, which was sold with her, and these had either been born dead or had died a short time after their birth, and the seller made no communication to the purchaser in relation to these occurrences. Now, in the first place, it was left wholly uncertain by the testimony, *how the fact was*, whether these children were born dead, or had died soon after their birth. In the next place, there was no testimony, that however the fact might be, *quacumque via data*, it furnished a rational ground to suspect that the mother labored under this disease. And, lastly, the purchaser, when he bought the mother and her youngest child, then *four* years old, was necessarily apprized that either she had ceased to breed, or had been unfortunate with her subsequent children. What might be the cause of this interruption in the increase of issue, according to the ordinary course of nature, was a fair subject of conjecture with both, and not more a matter of knowledge with one than the other. The remaining circumstance is, that the defendant sold the woman, though the only other female slave he owned was but 14 years of age. Before any inference of an unfair motive for making the sale could thence be deduced, there ought at least to have been some evidence of the situation of the defendant or his family, or of the peculiar qualities of this negro woman, repelling or tending to repel the ordinary presumption of fairness, which is always drawn by the law, until there be proof to the contrary.

(446) We feel ourselves constrained to hold, that there was error in leaving it to the jury to infer from the testimony a fraudulent intent in the defendant, when no evidence had been given from which such an intent could be inferred.

PER CURIAM. Judgment reversed, and new trial awarded.

DAVID C. GUYTHER, Adm'r of ROBERT GUYTHER, *vs.* JULIAN PICOT.

A petition was filed, an answer put in, and replication taken. Some terms afterwards, the defendant, by leave of the court, filed an amended answer, stating an additional fact, upon which he relied. No new replication was entered to this, but the parties went on to take depositions and make up an issue as to this fact. *Held* by the court, that from the conduct of the parties, it must be inferred that the additional fact stated, was intended as an amendment to the original answer, *nunc pro tunc*, and covered by the replication to that answer.

This was a petition originally filed in the County Court of Washington County, from which there was an appeal to the Superior Court of that County, and, an issue having been made up, the case was removed on affidavit, to the Superior Court of Chowan County. It came on to be heard at the Spring Term, 1841, of this latter court, before his Honor Judge NASH, who ordered the petition to be dismissed. From this decree, the plaintiff appealed to the Supreme Court. The facts and questions in the cause, are stated in the opinion of the court.

(447) *Kinney* for the plaintiff.
A. Moore & Iredell for the defendant.

DANIEL, J. The plaintiff filed this petition in the County Court, as the administrator of Robert Guyther, deceased, against the defendant, who had been the guardian of the said intestate, for an account of the estate. The petition states, that Robert Guyther had been a resident, and was at his death a resident, of the County of Washington; and that the County Court of Washington had granted letters of administration to the plaintiff. The defendant, at May Sessions, 1835, answered and stated, that one Peter O. Picot had been appointed, by the County Court of Martin, administrator with the will annexed on the estate of the said Robert Guyther, deceased, and that he had accounted with and paid over to the said Peter O. Picot, all the estate and effects which he had held as a guardian of his ward. To this answer the plaintiff put in a replication. There was an interlocutory decree that the defendant should account, from which he appealed to the Superior Court. In the Superior Court, the defendant obtained leave to amend his answer, in which he averred that the usual place of residence of Robert Guyther, at the time of his death, and many years previous to that time, had been in the County of Martin. There was no new replication put in. The cause was several times continued, and at subsequent terms, orders were made in the cause for each party to take depositions. At September Term, 1837, an issue was directed to try the fact,

whether Robert Guyther had been a resident, and domiciled in Martin or Washington County. The cause was then removed to Chowan County for trial. And at Spring Term, 1841, the judge dismissed the petition; being of the opinion that the pleadings did not warrant the introduction of evidence to the jury to try the issue. From this decree, the plaintiff appealed.

The defendant had not put in a supplemental answer, but had been permitted to add a single fact, by way of amendment, to his original answer. And the parties to the suit, by their subsequent conduct, had treated the amendment as having been made *nunc pro tunc*, and as being incorporated in the original
(448) answer, and therefore completely covered by the original replication. Where was the necessity of the orders in the cause subsequently made to take depositions, the order directing an issue, and the making of the issue by the parties, if it had not been understood that the material fact disclosed in the amended answer had been covered by the original replication? We think that the single fact, added or inserted as an amendment, must be considered as incorporated in the original answer, *nunc pro tunc*. The judgment must be reversed, and the cause again tried.

PER CURIAM. Judgment reversed.

ARCHIBALD G. CARTER *vs.* THOMAS MCNEELEY.

1. A party cannot recover on an implied agreement for the price of goods sold and delivered, if he could have maintained an action on a special contract relating to that price.
2. But where the special contract is imperfect, as where the price was to be the market value on a certain day and at a certain place to be fixed by the seller, and he fails to select in proper time the day and place, he may yet maintain an action for the value of the goods delivered, and declare in *indebitatus assumpsit*, on a *quantum valebat*.
3. But regard must be had to the special agreement so far, that the plaintiff cannot recover a higher price for his goods, than he could have done, if he had literally or duly observed the terms of the special contract.

This was an action of assumpsit, tried at Spring Term, 1841, before his Honor Judge MANLY. There having been
(449) a verdict and judgment for the plaintiff, under the charge of the court, the defendant appealed to the Supreme Court. The facts are set forth in the opinion of the court.

D. F. Caldwell for the defendant insisted, that the plaintiff should have been nonsuited; that he could not recover on an

implied contract for goods sold and delivered, when they were delivered under a special contract; that one party could not rescind the contract at his pleasure; and that the plaintiff, having been in default in not performing his part of the contract, forfeited all right of action. He cited the following authorities. *Jernigan* v. *Camp*, 13 Johns. Rep., 94; 2 Starkie Ev., 95, 96; *Wood* v. *Edwards*, 19 Johns., 205; *Robertson* v. *Lynch*, 19 John., 460; *Cutter* v. *Powell*, 6 T. R., 320; *Ellis* v. *Hamlin*, 3 Taunton, 52; *Young* v. *Jeffreys*. 4 Dev. & Bat., 216: Chitty on Cont., 275, 276; 4 East, 449; Powell on Cont., 416, 417.

Boyden for the plaintiff contended, that wherever, from circumstances that had occurred, no remedy can be had on the special contract, and the defendant has received benefit, the plaintiff may declare on the common counts, as for goods sold and delivered, &c. He cited, *Wilson* v. *Murphy*, 3 Dev., 352; *Linnerdale* v. *Livingston*, 10 Johns., 36; 7 Johns., 132; *Cook* v. *Mustoe*, 1 Bos. & Pull., new reports; *Payne* v. *Bacomb*, Douglass, 651; Selwyn's Nisi Prius, 57.

RUFFIN, C. J. This is an action of assumpsit, brought in December, 1837, to recover the price of a crop of cotton sold by the plaintiff to the defendant. It arises out of the transaction stated in the case reported, 1 Ired., 141, between the same parties reversed. The facts there stated, are agreed on in this case, with the addition of the following circumstances. The plaintiff delivered to the defendant, under the written contract, his crop in parcels, as follows:

1837. Jan. 25th,	. . . . .	*lb.* 5460
Apl. 14th & 15th,	. . . . .	4504¼
26th,	. . . . .	2922½

The declaration contained two counts: the one, on the
(450) special agreement and claiming the value at Camden, on the 31st of January, 1837, and the other, in *indebitatus assumpsit*, on a *quantum valebat*.

Upon the trial, the defendant offered to prove, that immediately after the execution of the agreement, it was said between the parties, that, if no time or place should be appointed, the first of June should be the day. But the court excluded the evidence. In submitting the case to the jury, the judge instructed them that the plaintiff could not recover upon his first count, but that he was entitled, upon the second, to recover the value of the cotton, at the place and on the respective days of delivery, deducting the sum of one thousand dollars, paid at the

date of the contract. There was a verdict and judgment accordingly, and the defendant appealed.

The correctness of the opinion on the point of evidence, is not questioned in the argument in this court. The difficulty on the merits of the case, arises from the want of an express provision in the contract, as to the effect of a failure of Carter to name a day and place, by which the price of the cotton should be regulated; and the object of the evidence was, to supply that omission, and thus add to, and vary the written agreement. That could not be done; and, for that reason, the evidence was incompetent. Besides, if it had been received, it would not have supplied the defect; since it only went to designate a day, but not one of the places named as that at which the market price was to govern. It was therefore also irrelevant, and for that reason ought not to have been heard.

In the state of this case, the instructions to the jury were, also, in our opinion, correct. The plaintiff certainly could not recover on the general count, if an action on the special agreement could be maintained; for parties cannot resort to an implied agreement to pay the value, according to quantity and quality of an article, bargained for at an agreed price. But here the contract fixes no price, but only designates a mode of doing so. That mode failed; and consequently the plaintiff could not support any count on the special contract, that is to say, he could not (451) recover the price, as determined by the price at either Fayetteville, Cheraw or Camden, on any day between the 25th of January and 1st of June. This was the substance of the decision in the former case, on this instrument. There being then no special agreement still subsisting, and so in force between the parties, as to enable the seller to recover thereon any price for his property, which the defendant got, it follows in justice, and, as we think, in law, that there must be some other means, whereby the defendant may be compelled to pay a fair price for that property. If the written agreement had stipulated, in case Carter should not select a place and name a day, that he thereby abandoned all further claim; or if, in the event, it had provided some other mode for fixing a price; in those cases, the agreement being perfect in itself, would be conclusive on the rights of the parties. But, as has been already observed, this agreement is silent in those respects, and is, therefore, imperfect, in not providing for an event that must have been known as possible, or even probable, and which has actually happened.

Notwithstanding that omission, the defendant urges on us a construction, which makes it mean the same thing, as if it contained an express clause of forfeiture, upon an omission by Carter to designate a day and place. But it is impossible to believe the parties meant any such thing. Suppose Carter had died the next day, before making his election, could it have been meant that McNeeley was to have his crop for nothing? Certainly not. The fair interpetation of the agreement is, that it was a sale of cotton; of course for the value at the place and time of delivery; with a power, however, to the seller, to vary that price, by taking that of another day and place, if designated by him within a certain period. This was the seller's privilege, at least mainly so; and he may give that up, without subjecting himself to the penalty of losing the whole value of the article. It is true, the special agreement is so framed, as not to enable him to recover on it. But for that very reason, he must have redress in the other form; since the defendant has voluntarily received the other's goods, and derived a benefit therefrom, and *ex æquo and bono* ought to pay for them. Bul. N. P., 139; (452) *Payne* v. *Bacomb*, Doug., 651. The only form in which he can recover is, the general count here adopted. In fine, the special agreement does not cover the case, which has happened, and therefore, as a bar to the general count, is out of the case altogether, and the seller is entitled to the remedy upon the contract, implied from the benefit to the other party, accepted by him.

It is not, however, to be understood, that even in such a case as this, no regard is to be paid to the special agreement. The principle on which we sustain this action, must be taken with this qualification; that the plaintiff cannot, by the omission to name a day or place, and by any other default on his part, deprive himself of a remedy on the special agreement, and resort to the implied contract, so as thereby to get a higher price than he would, had he literally or duly observed the terms of the special contract. If therefore, the defendant had shewn that the value of cotton at his factory, was greater on the days of delivery, than it was at Fayetteville, Cheraw or Camden on any day the plaintiff could have named, within the period allowed for that purpose, then the special agreement could have been properly invoked, as containing a price, beyond which the seller could not go. But nothing of the kind appeared on the trial. The price at those places may, on the other hand, have been higher than at the factory; and, if so, although the plaintiff may not have

entitled himself to the higher price, yet that furnishes no reason, why he should not be entitled to recover any price at all for the cotton received by the defendant.

PER CURIAM. Judgment affirmed.

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(453) BENJAMIN BURGIN, Sen'r, *vs.* JAMES BURGIN.

1. The owner of property may maintain, against a Sheriff, any action for detaining or converting his property, taken under an execution against a third person, which he could have, if the taking was without process; because he is a stranger to the process.
2. Where a creditor, knowing that another creditor has taken a deed of trust but which is not registered, takes another deed of trust on the same property, to secure his own debt, and procures it to be first registered, this is no fraud against any person, at least at law; more especially it is not a fraud against those who do not claim under the creditor secured by the first deed.
3. It is no ground for the court to pronounce a deed in trust fraudulent, *per se*, as against other creditors, that the property conveyed was to be sold at private sale; or that the surplus, after payment of the debts secured, was to be returned to the bargainor; or that the property conveyed is greater in value than the debts secured; these are circumstances to be submitted to a jury, to aid them in determining whether the intention of the parties was *bona fide*, or otherwise.
4. Neither will a delay in selling under a deed of trust, *bona fide* at first, avoid it; unless the delay and the uses had of the property by the debtor were such as to give him a false credit, and hold him out to the world as the owner of the property.
5. The cases of *Moore* v. *Collins*, 3 Dev., 136, and *Burgin* v. *Burgin*, *ante*, 160, cited and approved.

This was an action of trover, tried at the Spring Term, 1841, of Burke Superior Court of Law, before his Honor Judge BATTLE, where there was a verdict and judgment for the plaintiff, from which the defendant appealed. The facts and points raised, are stated in the opinion delivered by this court.

Caldwell for the defendant contended, that the evidence offered as to the prior deed, was improperly rejected; that it was (454) relevant to shew that the present deed was intended to defraud some creditors, and if to defeat any creditors, it was void; and cited, *Twyne's case*, 3 Co., 80; *Cadogan* v. *Kennet*, Cowp., 432. 2d. That a deed good at first, may become fraudulent by matter *ex post facto*. *Phipps* v. *Sands*, 2 Johns. C. R., 48; *Hungerfield* v. *Irwin*, 2 Ven., 261. 3d. That this deed was fraudulent on its face. 1 Story's Eq., 371, 372; 2 Kent, 4th Edit., 534, 535; *Kissam* v. *Edmonson*, 1 Iredell, 180; *Murray* v. *Riggs*, 2 Johns. C. R., 580; *Mackey* v. *Cairns*, 1 Hopk.,

373; *Grover* v. *Wickman*, 11 Wend., 187; 4 Page, 23; *Leadman* v. *Harris*, 3 Dev., 144; *Gregory* v. *Perkins*, 4 Dev., 50.

Alexander for the plaintiff, argued against these positions, and cited *Moore* v. *Collins*, 3 Dev., 126; *Wintringham* v. *Le Foy*, 7 Cowen. As to the action of trover being the proper action, he cited *Cooper* v. *Chitty & al.*, 1 Bur., 20; *Tinkler* v. *Pool & al.*, 5 Bur., 2657.

RUFFIN, C. J. One Benjamin Burgin was indebted to the present plaintiff, in the sum of $3,620.05¾, by bond, bearing date the 16th of August, 1837, and due one year thereafter, and in the further sum of $159, by bond, bearing date the 2d of December, 1837, and due one year thereafter; and, by way of securing the same, executed on the 4th day of December, 1837, a deed of trust to the plaintiff, whereby he conveyed to him several slaves, and other real and personal property, including debts due by bond and account, to a considerable amount, at least nominally, and about one hundred bushels of corn, and also some articles of household furniture. The deed expresses the following conditions or trusts: That if Burgin, the debtor, should pay those debts as they fell due, the deed should be void; but if payment should not be so made, then that the plaintiff might enter and take possession of the property, and "after advertising the same at five public places in the County of Burke, shall sell the same at private sale, to the highest bidder, on a credit of, &c., the purchasers giving bond and approved security; and out of the proceeds of such sale, shall pay the said debts, and interest thereon, and all reasonable charges in executing the trusts; and the overplus, if any, pay to the said Benja-
(455) min Burgin, or to his order; and it is covenanted and provided, that until there is a breach of the foregoing provisoes, so as to entitle the bargainee and trustee to enter, the said Benjamin is to remain in the quiet enjoyment of the premises." After the execution and registration of the deed, a *fieri facias* issued on a judgment rendered by a justice of the peace, against the said Benjamin Burgin, the debtor, for a third person, and was delivered to the defendant, a constable, who proceeded under it to take from the plaintiff's possession, and sell one of the slaves conveyed by the deed. Thereupon, the plaintiff brought this action of trover, on the 1st day of May, 1838, and issue was joined on the plea of not guilty. On the trial, the defendant's counsel contended, that an action of trover would not lie against a constable for seizing goods under due legal process; but the court held otherwise in this case.

It was then alleged on the part of the defendant, that the deed to the plaintiff was made to hinder and defraud other creditors of the debtor, Benjamin Burgin, and was therefore void. To establish the same, the defendant offered to prove, that before the execution of the deed to the plaintiff, the said Benjamin had, in South Carolina, executed a deed of trust for sundry articles of property, including the slave in dispute, in this action, to certain creditors of the said Benjamin, there resident, for the purpose of securing their debts; and that, with knowledge of that deed, but before the same was registered, the plaintiff procured the deed to himself, to be executed and registered, with intent to get the preference for himself; but the court refused to receive such proof.

Evidence was then given, that B. Burgin, the debtor, was much involved in debt, and indeed, insolvent at the time of executing the deed to the plaintiff; and that the property conveyed in that deed was much more than sufficient to satisfy the plaintiff's debt, though for a considerable part of it, and particularly from the debt assigned, but a small sum was realized. It was also proved, that Benjamin Burgin, the debtor, continued in possession of the estates conveyed, after the execution of the deed, and that he consumed the corn, and still retained the
(456) household furniture; and that the plaintiff did not make any sale upon the failure to pay the debt, which fell due in August, 1838. But it further appeared, that the plaintiff proceeded to sell as soon after the debt fell due in December, 1838, as he could, and did not raise money enough therefrom to satisfy his debts, and that he demanded from Benjamin Burgin the corn and furniture, and that, upon the refusal of Benjamin to deliver them, the plaintiff brought an action against him therefor.

Upon this case, the counsel for the defendant moved the court to instruct the jury, that the deed to the plaintiff was void, because it provided that the plaintiff might make a private sale; and because of the provision that any surplus, after satisfying the debts to the plaintiff, should be paid by him to Benjamin Burgin; and because a larger amount of property was conveyed by the deed than was sufficient to pay the debts to the present plaintiff, which, therefore, the parties intended to cover and protect from the other creditors of the debtor, for the benefit of himself and his family.

And on the part of the defendant, the court was also moved to instruct the jury, that if the deed were *bona fide*, and valid

at its execution, yet it became fraudulent and void by the conduct of the plaintiff, in afterwards permitting the debtor to consume the corn and retain the furniture, and in not selling the effects as soon as the first debt became due.

The court held, that none of the circumstances relied on by the defendant, amounted to fraud, *per se*, so as to enable the court to pronounce the deed fraudulent and void, for any matter apparent thereon. And the court instructed the jury, that if the deed was executed *bona fide*, to secure honest debts to the plaintiff, the subsequent conduct of the parties, as stated in the evidence, would not avoid the deed of itself; but that such conduct was evidence, from which the jury might infer a fraudulent design, originally, in the execution of the deed. And the court further instructed the jury, that if the deed were executed for the sole purpose of securing the debts to the plaintiff, and without any intention of hindering or defrauding other creditors of the maker of the deed, then it was good, notwithstanding more property was conveyed than was necessary to satisfy those
(457) debts: but if the parties had an intent to cover any of the property of the debtor, for the benefit of the debtor or his family, then that intent was fraudulent, and made the deed void; and, to ascertain whether such an intent existed or not, the jury might take into consideration the value of the property conveyed, and the amount of the debts to the plaintiff, and that the evidence would be stronger or weaker, according to the amount and nature of the property, and the greater or less probability of its being made available to the satisfaction of the debts.

The jury found a verdict for the plaintiff, and from the judgment thereon, the defendant appealed.

We are unable to see any ground for disturbing the judgment of the Superior Court. It is possible the jury may have erred in the conclusions drawn by them, though nothing appears to satisfy us that even that is so. But certainly the court did not, in our opinion, err, to the prejudice of the defendant, in the propositions stated to the jury as the law of the case. In the first place, we will observe, that all the evidence respecting a prior deed of trust, was irrelevant and properly excluded. The defendant did not connect himself with the persons intended to be secured thereby, and could not complain that they had been defeated. The defendant represents a general creditor of the insolvent, and he must shew something in the deed to the plaintiff, which the law deems fraudulent against such a creditor. But the imputed fraud, which he offered to prove, was not a fraud

against persons standing in the relation of general creditors, but that of creditors claiming under the security of a prior imperfect deed; with which the defendant and the creditor, for whom he acted, had nothing to do. An answer equally decisive is, that even the creditors mentioned in that deed could not impeach the deed to the plaintiff on that ground. The statutes expressly declare, that a mortgage or deed of trust shall be void, as against a purchaser or creditor of the person making the deed, unless it be registered within the time prescribed; and moreover, that it shall have no operation until it be registered. At all events, then, the plaintiff cannot be regarded as guilty of a fraud on the
(458) persons claiming under the prior deed, at least in a court of law; since, under that deed, no rights legally arose.

There is no doubt that the owner of property may maintain, against a sheriff, any action for detaining or converting his property, taken under an execution against a third person, which he could have, if the taking was without process. Being a stranger to the process, it has no operation against the plaintiff. In another case arising on this very deed, the court held that the action of trover would lie against the constable and the plaintiff in the execution, under which another negro was seized and temporarily kept. *Burgin* v. *Burgin*, 1 Iredell, 160.

We will now advert to the other grounds for imputing fraud to the plaintiff. One is, that the deed authorises a private sale. But, at most, that would be only evidence of fraud, to be left to the jury, and not fraud *per se*, as here contended. A higher price may sometimes be got by private contract, than by auction; and there is no allegation that there was here any design to sacrifice the property, or that it was not in fact fairly sold for proper prices. But other provisions of the instrument plainly shew, that the word "private" was inserted by the misprision of the writer, for the sale is directed to be after public notice, and to the highest bidder. It is obvious, therefore, that a public sale was intended. If so, the deed could not be deemed fraudulent, without giving that character to a mere mistake.

The other directions of his Honor, in reference to the reservation of the surplus to Burgin, the debtor, after payment of the plaintiff's debts, and to the supposed disparity between those debts and the value of the property and debts assigned, we deem unexceptionable. They have the direct sanction of this court, in *Moore* v. *Collins*, when first here, 3 Dev., 126; and as far as these questions were involved, the opinion of the court was unanimous. The express provision, that such part of the estates

conveyed, or their proceeds, as may not be necessary to discharge the debts, should result to the maker of the deed, or be paid to him, can do no harm; for it is merely a work of super-
(459) erogation to insert it, and the deed means the same thing, whether it have or have not that clause. So, with respect to the amount of property, it must be remembered, that, as it cannot be ascertained what accidents may occur to diminish the perishable part of it, or lessen its value, or how old accounts will turn out upon collection, it is usual to convey more in mortgage or trust, by way of security, than it may be supposed will precisely meet the demand. It is, indeed, fair, that the creditor should have ample security, and, therefore, it furnishes no conclusive argument of a dishonest purpose, if the deed conveys property of value fully to cover the debts, under any and all contingencies that may be expected, or reasonably apprehended. But it is equally true, that, under pretence of securing a debt, the debtor may convey much more than necessary for that purpose, and really, for the purpose of securing the use to himself, and baffling his other creditors. Hence, the question is one of intention; and, as such, it was in this case properly left to the jury, with the requisite explanations of the grounds of presumption in support of, and against the deed. The jury found that there was no intention to cover the property from the debtor's other creditors, but that the sole intention was to secure the debts to the plaintiff. How they could have found otherwise, we should be at a loss to say; since the case states, that however much the property was at first supposed to exceed the debts, it has turned out in fact that, either from seizures, by other creditors, or the insolvency of the debtors, the plaintiff has been unable as yet to get his debts.

With respect to the delay in making the sale, and the circumstances, that the plaintiff has not yet sold the furniture, and cannot sell the corn, which has been consumed, it is to be remarked, that the present defendant sets up those objections with a bad grace, since he took the slave in the Spring of 1838, and this action was brought on the first of May, of that year, being four or five months before the plaintiff could have sold. But, clearly, the delay to sell, and the other circumstances subsequently occurring, cannot destroy the deed, if *bona fide* at first, unless the delay and the uses had of the property by the debtor, were
(460) such as to give him a false credit, and hold him out to the world as the owner of the property; nothing like which is pretended.

Upon the whole, the case was fairly submitted to the jury upon every point, on which it was material that body should pronounce on the intention of the parties; and we think the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

JOHN COLE & WIFE & OTHERS *vs.* PETER H. COLE.

1. Where a testator bequeaths a negro woman and *her increase*, and there are no other words in the will to explain his meaning, only the increase born after the death of the testator, will pass.
2. Where the jury find for the defendant upon the general issue, this court will not enquire into the correctness of the judge's charge, as to the other plea of the statute of limitations.
3. The cases of *Morrisey* v. *Bunting*, 1 Dev., 3, and *Bullock* v. *Bullock*, 3 Dev., 260, cited and approved.

This was an action on the case tried at Spring Term, 1841, before his Honor Judge DICK, when there was a verdict rendered for the defendant, and a judgment pursuant thereto, from which the plaintiff appealed to the Supreme Court. The plaintiff declared in two counts: First, for the trover and conversion of certain slaves; Secondly, for a tortious act
(461) done by the defendant, to the injury of the plaintiffs, during the continuance of a life estate in the said slaves, the plaintiffs being entitled in remainder, after the death of the tenant for life. The plaintiffs, on the trial, abandoned the count for trover. The pleas were, the general issue and statute of limitations.

The facts of the case are sufficiently stated in the opinion of the court.

No counsel for plaintiff.
Strange for defendant.

DANIEL, J. This was an action on the case. Pleas, general issue and statute of limitations. Thomas Foxhall, in the month of July, in the year 1791, made his will, and bequeathed a slave by the name of Fan, and her *increase*, to his daughter, Joanna Sergener, for life, remainder to her children. The will was proved at August Court, 1792. The plaintiffs are all the remaindermen but one; and the action is against the defendant, (who had purchased the life estate of Joanna Sergener, and also the interest of one of the children in remainder), for selling the slaves, and sending them beyond the limits of the State. The slaves in controversy, are the issue of Diana, who is the daughter

of Fan. The defendant contended, 1st, that the slave Fan had been given to Joanna Sergener, by her father in his life time, and therefore did not pass by his will; 2dly, that Diana had been born of Fan before the death of the testator, and, therefore, did not pass by the will to Mrs. Sergener and her children; and 3dly, that as he was a tenant in common, in remainder with the plaintiffs, this action could not be maintained against him. The judge left the two first points to the jury upon the evidence, with instructions to find for the defendant, if either of them were true in fact. But that if the jury should find against the defendant upon both of these points, then on the third point he charged them, that a sale of the slaves by the defendant, to be carried out of the State, was equivalent to a destruction, and the action was maintainable. Upon the statute of limitations, the judge instructed the jury, that it began to run from the
(462) time the tortious act or acts (the sales of the slaves,) were done by the defendant, and not from the death of Joanna Sergener, the tenant for life. The jury returned a verdict upon both issues in favor of the defendant. There was a judgment for the defendant, and the plaintiff appealed.

The charge of the Judge upon the general issue, was as favorable to the plaintiffs, as they could reasonably have desired. He said, that if the slave Fan was the testator's property at the time of his death, and Diana was born of Fan subsequent to that time, then the plaintiffs were entitled to maintain their action against the defendant, for selling the slaves out of the State; although at that time he was a tenant in common with them; that if Diana was born after the date of the will, but before the death of the testator, she did not pass to Mrs. Sergener and her children, under the words, "Fan and her increase." The will speaks at the death of the testator. There are no words in it, that we can discover, to denote an intention of the testator, that the increase of Fan, born before the testator's death, should go to Mrs. Sergener and her children. And without some other words in the will denoting a different intention, the word *increase, per se,* is to be considered as referring only to such children of the slave Fan, as should be born after the legatees became entitled to her. We discover no error in the charge of the Judge upon the general issue, of which the plaintiff can complain, and it is unnecessary to enquire, whether the defendant has cause to except to it. And as the jury have found for the defendant upon that issue, it becomes immaterial to enquire, and this court will not examine, whether the charge was right or

wrong upon the other issue, the statute of limitations. *Morrisey* v. *Bunting*, 1 Dev., 3; *Bullock* v. *Bullock*, 3 Dev., 260. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

(463) DAVID MONTGOMERY *vs.* NEAL MCALPIN.

1. A sheriff on a writ of *capias ad respondendum* returned "Executed; the defendant is confined in the jail of my county on a *ca. sa.* issued by a justice of the peace in favor of A. B., consequently he cannot at present be carried to the court." The plaintiff obtained judgment in his suit and issued a *ca. sa.* to the same sheriff, who returned on it "not to be found." *Held* that the sheriff was not answerable *as bail.*
2. The return of the sheriff in such a case that the body of the defendant is in the prison of his county under other process, is a return that he *keeps* the body of such prisoner there under the process so returned, and is tantamount to a commitment under this process. After this the *sheriff* cannot take bail, but if he releases the prisoner or permits him to depart from prison, without a rule or order of court, he is guilty of an escape.
3. After such a commitment the prisoner can only be admitted to bail *in court.*

This was an appeal from the judgment of the Superior Court of Law of Caswell County at the Spring Term, 1841, his Honor Judge PEARSON presiding, on a *scire facias* charging the defendant as bail. The court having decided in favor of the defendant, the plaintiff appealed. The facts of the case are stated in the opinion delivered by the court.

J. T. Morehead for the plaintiff.
W. A. Graham for the defendant.

GASTON, J. A writ was issued from the Superior Court of Law for the County of Caswell, directed to the defendant, Sheriff of the County of Robeson, commanding him to take the body of Robert W. Mason and him safely keep so as to have him before the said court, at the next term thereof, to answer to the plaintiff of a plea of debt, which writ came to the hands of the defendant and was returned "Executed; the defendant is confined in the jail of my county on a *capias ad satisfaciendum* issued by a justice of the peace in favor of Richard C. Bunting, consequently he cannot at present be carried to Caswell." Upon this return the plaintiff took a judgment by default (464) against Mason, and had a writ of enquiry of damages. This writ was afterwards executed, and the plaintiff had a final judgment for debt and damages, and sued out a *ca. sa.*

directed to the defendant, which was by him returned "not to be found." Thereupon the plaintiff sued out a *scire facias* against the defendant as the special bail of Mason, and it was submitted to the court as a question of law upon these facts, whether the defendant had thereby become the special bail of Mason. The court was of opinion that he had not

We concur in this opinion. The act of 1777, ch. 115 (Revised Stat., chap. 10. sect. 1) directs that when a writ shall issue to a sheriff, commanding him to take the body of any person to answer to any action, he shall take bond with sufficient sureties in double the sum, for which such person shall be held in arrest, and shall return such bond with the writ; and in case he shall fail or neglect to take such bail, or the bail be held insufficient, on exception taken and entered, the same term to which such process shall be returnable, the sheriff having due notice thereof, shall be deemed and stand as special bail. It is further provided by the same act (Rev. St., ch. 31, sect. 54,) that when a sheriff shall return that he hath taken the body of the defendant and hath committed him to the prison of the county, which is declared to be the proper place for such commitment, the plaintiff may enter the defendant's appearance, and he shall be at liberty to plead, as if such appearance had been entered by himself, and the plaintiff may proceed as in other cases; nevertheless the defendant shall not be discharged out of custody, but by *putting in bail* or by rule of court.

Were these the only legislative enactments bearing upon this case, there could be no plausible ground for charging the defendant as bail. A return by the sheriff that he has executed the writ and that the body of the defendant is in the prison of his county under other process, is a return that he *keeps* the body of such prisoner there under the process so returned and is tantamount to a *commitment* of the body of such defendant to the prison of his county under this process. After such a return all power of the sheriff to take bail is gone. He must keep
(465) the prisoner in such prison, until the prisoner is discharged by "putting in bail," or by rule of court. The phrase "putting in bail," is one of well ascertained meaning; and is applicable to the entering of bail to the action, which is done in court after the appearance of defendant in discharge of bail given to the sheriff upon the execution of the writ. If the sheriff release the prisoner or permit him to depart from prison, before such bail is put in as above, or there is a rule of court to discharge him, the sheriff is guilty of an escape.

By the same act a provision is made in favor of bail (see Rev. St., Ch. 10, Sect. 4,) that they may, at any time before final judgment against their principal, surrender him to the court or to the sheriff in the recess of the court, and it is made the duty of the sheriff, when such surrender is made to him, to hold the body of the person so surrendered in custody. Under this act the sheriff could not admit him to bail.

But by the act of 1827, ch. 40, (Rev. St., Ch. 10, Sect. 5,) it is enacted that a person surrendered to the sheriff, after the return court, shall have liberty to give other bail, and it is thereby made the duty of the sheriff to take the same and return the bail bond to the succeeding court; and in case the sheriff shall release such person without bail, or the bail returned be held insufficient on exceptions taken and allowed, the same term to which such bail bond shall be returnable, the sheriff, having due notice thereof, shall be deemed and stand as special bail.

Upon this act a question arises, whether it repeals or changes the enactment in the act of 1777, which makes it imperative on a sheriff, who has executed a writ by committing the person arrested to prison, and has so returned upon the writ, to keep such person in custody, until bail be put in, or he be discharged by rule of court. Is he by this act required or authorized to take bail from a person so committed?

We do not feel ourselves authorised so to hold. The Legislature has in terms confined the operation of this act to the case of one, who has been heretofore on bail, and is by such bail surrendered. To this surrender they have chosen to communicate the qualities and properties of an original arrest. (466) For one thus surrendered the sheriff is required and authorized to take bail. But they have given him no new authority and imposed upon him no new duty, with respect to one, who has never been out on bail, but was imprisoned on the original arrest. His case is left—and we must suppose purposely left—under the law theretofore established. He is to obtain his discharge only "by putting in bail, or by rule of court." If he be permitted to go at large before obtaining such discharge, the sheriff is liable for the escape, but is not responsible as bail.

PER CURIAM. Judgment affirmed.

Den ex dem. MARY DUNCAN *vs.* ROLAND DUNCAN.

Where an action of Ejectment was referred, by rule of court, to arbitrators, and they awarded as follows: "We find the plaintiff in the case, Mary Duncan, has at various times paid to Roland Duncan, in cash, notes and property valued $1,544: we therefore award to her ¾ the whole amount of land purchased of the executors of Charles Finlay, dec'd, to be taken off of the upper part of said land;" *Held* that this award was not only uncertain, but that it went beyond the rule of reference, and therefore the court will not enter judgment on it.

This was an appeal from the judgment of the Superior Court of Law of Burke county, at Spring Term, 1841, his Honor Judge BATTLE presiding, ordering an award which he has made in the case to be set aside. Three several suits were
(467) pending between these parties, of which one was an action of Trespass *quare clausum fregit*, another an action of trespass on the case in assumpsit, and the present action of ejectment. They were, by separate and distinct rules of court, referred to the same persons as arbitrators, who returned, so far as regards this case, the following award: "In the case of ejectment, we find the plaintiff in this case, Mary Duncan, has at various times paid to Roland Duncan in cash, notes and property valued fifteen hundred and forty-four dollars. We therefore award to her three-fourths of the whole amount of land purchased of the executors of Chas. Finlay, dec'd, to be taken off of the upper part of said land." To this award the defendant filed the following objections: "The defendant excepts to the award made in the several cases named in the said award, 1st, because the referees have embraced in their award questions not submitted to them; 2d, because the award is vague and uncertain; 3d, because they have not awarded on all the matters submitted to them." The exceptions, so far as they relate to the present case, were sustained by the court upon the ground that the arbitrators had exceeded their authority in assuming to decide upon what part of the land in controversy the plaintiff's lessor should take the share, to which they found she was entitled. The award was accordingly ordered to be set aside and the lessor of the plaintiff, by permission of the court, appealed from this order.

D. F. Caldwell for the plaintiff, contended that arbitrators had more power than courts, and that an award could only be set aside at law for error apparent on the face of it or for corruption in the arbitrators. Caldwell on awards, 52, 53; *Fontaine* v. *Carson*, 7 Cranch, 596; *Waugh* v. *Mitchell*, 1 Dev. & Bat. Eq., 510; *Pierce* v. *Perkins*, 2 Dev. Eq., 250.

Alexander for the defendant. Arbitrators can only decide what is submitted to them, and, in this case, that which was submitted to them was only what would have been submitted to a jury, if the case had been tried in court. *Harding* v. *Beattie*, 4 Dev. & Bat., 381; 2 Chitt. Genl. Practice, 106. They
(468) have gone beyond this submission, and besides, their award is so vague and uncertain that the court cannot pronounce judgment on it.

GASTON, J. In the case made for the consideration of this court, it is stated that the exceptions taken by the defendant to the award, returned by the referees, were sustained by the court and the award set aside. If we are to understand by this, that the court decreed that the plaintiff should not be permitted to avail herself of that award in any way, either by action or a bill in equity, we should hold such decree erroneous; first, for that it transcended the jurisdiction of the court, and secondly, because, though the award might not be warranted by the *rule* of reference, *non constat* but that there was a more extensive submission, that might render it available between the parties. But we do not so understand the act of the court. By a rule of court in this cause the matter therein depending was referred, and the award, if sanctioned by the court, was according to our practice to become a judgment. Exceptions were made to it, as an award, *under that rule*, and the court sustained these exceptions, and set it aside so far as to refuse to render a judgment thereon. In doing this we are of opinion there was no error.

There are objections to the award, which we think insuperable. The submission can be understood as extending no further than to the matter disputed in the suit—the right of the plaintiff to the possession of the premises described in the declaration. Under this submission, the referees "find that the plaintiff Mary Duncan has paid the defendant Roland Duncan $1,544, and therefore award to her three-fourths of the whole amount of land purchased of the executors of Charles Finlay, deceased, to be taken off of the upper part of said land." What is the land purchased from the executors of Finlay? There are eight distinct tracts set forth in the declaration. Are all these embraced within this description? If not all, which of them are comprehended therein? The award is wholly uncertain in this respect—and nothing appears whereby that uncertainty can be removed.

But they award to Mary Duncan three-fourths of this land,
"to be taken off of the upper part." From the strong
(469) disposition which courts feel to support awards, and the consequent liberality in expounding them, an award to

Mary Duncan of the land described in the declaration, or any defined part thereof in severalty, or of any undivided share thereof, might be understood, by reference to the action, as a finding that judgment be rendered for the whole, or such part, or such undivided share. But they award three-fourths, to be taken off of the upper part. *This* cannot be done by a judgment in ejectment. How is it to be done? It must be by some future action of the parties. And when we connect this future action with the introductory part of the award, setting forth that Mary Duncan has paid so much on account of the land, we are obliged to understand that the referees intended to decree that the defendant should convey such an interest. So understood, the award goes beyond the rule of reference.

It has been argued that judgment may be entered for the three undivided fourth parts, disregarding the direction that they be taken off of the upper part of the land. But this we cannot do, for it would be to alter the award. It does not consist of two distinct matters—the one within, the other without the submission—but it is one indivisible award, and judgment must be rendered in pursuance thereto or not at all.

PER CURIAM. Ordered that this opinion be certified to court below.

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(470) NATHAN STEWART *vs.* DANIEL GARLAND.

1. When an appeal is brought up to this court, it is the duty of the appellant to have the transcript of the record so perfected that this court may be enabled to discover the error in the judgment of the Superior Court, if there be any; and, on his failure to do so, after a reasonable opportunity has been afforded, the judgment will be affirmed.
2. Where the judgment below was of nonsuit, and no declaration was filed, and the plaintiff, after reasonable time allowed, failed to supply that defect, *that* also is a ground for affirming the judgment.
3. The cases of *Brooks* v. *Ross*, 2 Dev. & Bat., 484; *Wall* v. *Hinson*, 1 Iredell, 276; *Williamson* v. *Rainey*, 3 Hawks, 9; and *State* v. *Reed*, 1 Dev. & Bat., 377, cited and approved.

This was an action for malicious prosecution, in which, at Fall Term, 1839, of Macon Superior Court of Law, his Honor Judge PEARSON, presiding, the plaintiff was nonsuited. From this judgment the plaintiff appealed to the Supreme Court. The facts of the case, so far as necessary, are stated in the opinion of the court.

No counsel for the plaintiff.
Francis for the defendant.

RUFFIN, C. J. The record contains a statement of the proceedings which took place at the trial; which is, in substance, that the action was for a malicious prosecution, which the present defendant had formerly instituted against the plaintiff by suing out against him a peace warrant, on which he was arrested and imprisoned by order of a justice of the peace, for the want of sureties; and from which, as the plaintiff insisted, he had been finally discharged by the County Court to which the warrant and proceedings thereon were returned by the magistrate. The case then states that the order of the County Court was read in evidence, and that a copy thereof is annexed to the
(471) exception or case, as a part thereof; and that the defendant insisted that, according to the terms and meaning of that order, the County Court did not decide that there was not probable cause for arresting the plaintiff and requiring sureties for the peace, but only that it was not proper and necessary to keep him longer under arrest and further to require sureties; and that the defendant further insisted that no action for malicious prosecution would lie in such a case, and especially after the examining magistrate had adjudged that the plaintiff should give sureties on the warrant. Those questions were, by consent, reserved by the court, with liberty to the defendant to move to set the verdict aside, if one should be found for the plaintiff, and to enter a nonsuit. The jury found for the plaintiff, and on the points reserved the court ordered a nonsuit, and the plaintiff appealed.

Upon opening the record in this court, at December Term, 1839, it was discovered that the warrant and the proceedings thereon, and judgment of the County Court were not annexed to, or inserted in, the record; and also that the transcript was defective in not containing the declaration; and an order was made, giving the appellant time until the next Term to complete the record. Subsequently a *certiorari* was issued for a more perfect transcript; and upon it, at the last Term, December, 1840, the clerk returned a transcript of the same tenor with that before filed; and now, at this Term, counsel has moved, on behalf of the defendant, that the court shall pronounce judgment on the transcript as it is.

Having granted indulgence to the plaintiff, in great latitude, to enable him to put the record into a state upon which the questions made on the trial could be decided on their merits, and he having failed to avail himself of that indulgence, the court is obliged to affirm the judgment, upon the ground, that the appel-

lant hath not put his case into such a form as to enable this court, if there was an error committed by the Superior Court, to see it. It has been repeatedly declared by us that a judgment can only be reversed for error, against the appellant, apparent on the record; and, therefore, the appellant must see that (472) every thing is stated in his exception, which is requisite to the determination of the question, whether the Superior Court decided right or wrong: the former being presumed, unless the latter can be seen. Here, the controversy turned on the effect of the judgment of the County Court, and his Honor put his construction thereon. Whether our opinion would concur with his, it is impossible to say, without our seeing that judgment, as he did; and the appellant has not supplied it to us. Therefore, supposing this action would lie in any case—a point on which we do not think proper to express an opinion at present—yet the judgment of nonsuit, in this case, cannot be reversed by this court, inasmuch as the appellant has not supplied the means of detecting the error of which he complains. *Brooks* v. *Ross*, 2 Dev. & Bat., 484; *Wall* v. *Hinson*, 1 Iredell, 276.

Besides that, the want of a declaration is fatal to the appellant's case. It was, doubtless, waived in the Superior Court, according to our loose practice; and for that reason, the court has staid proceedings here and granted a *certiorari*, in order that the record might be perfected in the Superior Court, by leave of that court, and a transcript of it, in its perfect state, brought up to us. *State* v. *Reed*, 1 Dev. & Bat., 377. But we do not feel at liberty longer to stay the action of the law, and, of course, must decide that the want of a declaration prevents the nonsuit being set aside. *Williamson* v. *Rainey*, 3 Hawks, 9.

PER CURIAM. Judgment affirmed.

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(473) ARNOLD WHITFIELD *vs.* ROBERT JOHNSTON.

When the proceedings before a magistrate, upon which he issues an execution, are annexed to the execution, and it is apparent from them that there is no judgment authorising an execution, the constable who has the execution, must take notice of that fact, and will be guilty of a trespass, if he proceeds to make a levy under the process.

This was an action of trespass *vi et armis*, tried at Spring Term, 1841, of Martin Superior Court of Law, before his Honor Judge SETTLE. The action was brought to recover damages for seizing and selling the plaintiff's horse. It was admitted by the defendant that he did seize and sell the horse,

but he insisted that he was justified in so doing by process, a copy of which is inserted below; and, by consent of the parties, the jury found all the issues in favor of the plaintiff, and assessed his damages to $100, subject to the opinion of the court as to the defendant's liability. His Honor being of opinion that the defendant was justified under the process, set aside the verdict, and the plaintiff, in submission to the opinion of the court, suffered judgment of nonsuit to be entered against him, and appealed to the Supreme Court.

Copy of the proceedings and process under which the defendant insisted he was justified.

STATE OF NORTH CAROLINA, }
Martin County. }

To any lawful Officer to execute:

You are hereby commanded to arrest the body of Arnold Whitfield, (if to be found in your county,) so that you have him before some justice for said county, at Hamilton on the 4th day of May, 1839, then and there to answer John J. Lancaster, in an action of debt due by account to the amount of sixty dollars.

Given under my hand and seal, this 15th day of April, 1839.

JOHN LONG, [J. P.]

(474) On the back of this warrant were the following endorsements:

Executed by
ROBERT JOHNSTON.

Judgment against the defendant for ten dollars and costs. May 4th, 1839. L. JOHNSTON.

An appeal craved and granted to the County Court next, by giving for security ASA. PRICE.

Attest, L. JOHNSTON, J. P.

Whereas an appeal has been prayed and granted, and a failure on the part of the justice of the peace, I therefore grant an execution and require that you execute and sell as the law directs of the goods and chattels of the deft. for the amount of the within principal and costs.

THOMAS JONES, [J. P.]

This the 28th day of October, 1839.

B. F. Moore for the plaintiff.
J. H. Bryan for the defendant.

DANIEL, J. It is true that a constable is justified by an execution, issued by a competent tribunal, in doing all acts commanded by the execution. But in this case the execution was not only attached to the proceeding, which shewed the defendant that there was no judgment to authorise the justice to issue the execution, but actually recited that the judgment had been vacated by appeal. He saw, then, that the execution was an act done, which was beyond the power of the justice, and that it was void. The defendant was aware that the justice had no authority to issue this execution; and being thus apprised that it was void, we think that he is not justified under it. The judgment of nonsuit must therefore be set aside, and judgment must be rendered for the plaintiff pursuant to the verdict.

PER CURIAM. Judgment accordingly.

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(475) ABRAHAM HOWZER *vs.* MOSES DELLINGER.

1. Although the bail may surrender their principal, and the surrender be entered of record at the term when judgment is obtained, yet if the plaintiff does not pray the committal of the principal in execution and the latter should afterwards go at large, this is not a discharge of such principal from execution by the plaintiff.
2. The bail on a plea to a *sci. fa.* seeking to charge them, cannot take advantage of any irregularity in the *ca. sa.* against the principal, but they may shew that the *ca. sa.* is void.
3. A *ca. sa.* must strictly pursue the judgment and be warranted by it, as if the judgment be against two or more, the *ca. sa.* must issue against all—otherwise it is void.
4. The case of *Findley* v. *Smith*, 3 Dev. Rep., 247, cited and approved.

This was an appeal from the judgment of Lincoln Superior Court of Law, at March Term, 1841, his Honor Judge MANLY presiding. The following is the case transmitted to the Supreme Court.

This was a *scire facias* against Moses Dellinger as bail of one Lawson Henry. Pleas, *nul tiel record*, surrender of one of the principals, Mary Henry, no *capias ad satisfaciendum*. One of the questions in this cause was, whether the paper introduced which purported to be a *ca. sa.* against Lawson Henry alone was a sufficient *capias ad satisfaciendum* to warrant the proceedings against the bail. A judgment in an action of trespass had been rendered against Lawson Henry and Mary Henry at Fall Term, 1839, at which term the defendant, Moses Dellinger, on Wednesday of the same term, brought into court Mary Henry, one of the defendants in the original suit, and surrendered her in

discharge of himself as her bail. The following is a copy of the entry, which was all the evidence in the cause upon this question. "Moses Dellinger brought Mary Henry into court & surrendered her to the court in discharge of himself as bail of the said Mary Henry." The defendant's counsel
(476) insisted that this entry shewed that Mary Henry, a co-defendant in the original suit, had been in execution and permitted to go at large by the plaintiff, whereby the defendant was discharged as bail of Lawson Henry as well as of Mary Henry. The defendant's counsel further insisted that the *ca. sa.* being against Lawson Henry alone, when the judgment was against Lawson and Mary Henry, it was absolutely void, and therefore would not support the proceedings against the defendant as bail of the said Lawson. The court charged the jury that if one of two defendants were in execution and discharged or permitted to go at large by the consent of the plaintiff, it would amount to a discharge of the bail for the other defendant also, but that the entry upon the docket during the term at which the trial took place, "that the defendant Dellinger had surrendered Mary Henry in discharge of himself as her bail," without any evidence that she was ever in execution, would not discharge the defendant Dellinger as bail of the said Lawson Henry. Also the court further instructed the jury, that regularly the *capias ad satisfaciendum* should follow the judgment, and where the judgment was against several defendants the execution should issue against them all, if living; but issuing the execution against one of the defendants, instead of both, as in this case, did not render the execution absolutely void; that it was an irregularity, for which the court, at the instance of the defendant in the execution, might, and probably would, set aside the execution; but still the defendant Dellinger could not in this way avail himself of the irregularity, and that the paper constituted a sufficient *ca. sa.* to warrant the *sci. fa.* against the bail. Under this charge the jury found for the plaintiff, and the court adjudged there was such a record. A new trial having been moved for and refused, and judgment rendered for the plaintiff, the defendant appealed to the Supreme Court.

Boyden for the plaintiff. Execution may issue in some cases against one defendant alone. 2 Rolle's Ab., 468; *Douglass* v. *White*, Cro. Jac., 373. An irregularity in an execution can only be taken advantage of by the defendant in the
(477) execution. *Jackson* v. *Bartlet*, 8 John. Rep., 281; 2 Tidd's Pr., 1044; *Downey* v. *Dunn*, 2 Bos. & Pul., 47;

Gillespie v. *White*, 16 John., 117; *Shirley* v. *Wright*, 2 Ld. Ray., 775. As to the surrender of the defendant Mary Henry, this being at the term when the judgment was rendered, the plaintiff could not pray her in execution; he could only have execution after the term expired, and then might take execution at his election against her goods or her body.

Wm. H. Haywood, jr., for defendant.

DANIEL, J. The plaintiff sued Lawson Henry and Mary Henry in an action of trespass. Dellinger became bail for each. At the term at which judgment was obtained against both, the bail surrendered Mary Henry, and the same was rendered of record. The plaintiff then did not move the court that she should be committed in execution. As she never had been in execution, at the instance of the plaintiff, he of course could not and did not discharge her from execution. The opinion of the Judge upon this point of the case, to wit, that the bail of Lawson Henry was not discharged, was correct. *Secondly*, on the trial of the issue made up on the plea "no *ca. sa.* against the principals," the plaintiff offered in evidence a *ca. sa.* against Lawson Henry alone. The defendant objected to the evidence, and contended that the *ca. sa.* was void, as it was not as broad as the judgment. The Judge, however, was of opinion that the execution was not void, but irregularly only; and that the bail on this *sci. fa.* had no right to take advantage of the irregularity, and that it was sufficient to support the plaintiff's side of the issue. We, after much reflection, are induced to think that the Judge erred in admitting this document as a sufficient *ca. sa.* A writ of *ca. sa.* against the principal must be sued out and returned *non est inventus*, before any proceedings can be had against the bail. 1 Bran. & Alder., 212; Petersdorf on Bail, 335; Rev. St., c. 10, s. 3. In England, the practice is to direct the *ca. sa.* to the sheriff of the county, where the *venue* was laid; and the writ must lie, the four last days exclusively before the return, in the sheriff's office. The sheriff's return of *non est* (478) *inventus* is a matter of course, without making any attempt to arrest the principal; the *ca. sa.* being intended merely as a notice to the bail of the plaintiff's intention to proceed against them. 3 Burr., 1360; 1 Arch. Pr., 220. But, under our statute, the *ca. sa.* is required as well for the benefit of the bail as of the plaintiff, and the *ca. sa.* ought to be issued to the county where it may be executed by the actual arrest of the defendant, if that can be done. The execution, required by our act, was intended to be an effectual one. *Findley* v. *Smith*, 3

Dev. Rep., 247. It is true that the bail cannot take advantage of any irregularity in the *ca. sa.*, as if it be irregular in its *teste* or return, or if it be sued after a year and a day from the signing of the judgment. 2 Ld. Ray., 1096; 2 Burr., 1187; 1 Arch. Pr., 320. But if the writ is void, he may shew it. In 1st Arch. Pr. K. B., 283, it is said that care must be taken that the writ of execution strictly pursue the judgment, and be warranted by it; otherwise it is *void*. Thus upon a judgment against two (as in this case) you cannot sue out a separate *capias* against one. Rol. Abr., 888; 6 Term R., 523. Nor a *capias* against one and an *elegit* against another. Cro. Eliz., 573–4–5; Co., 26–7; 2 Bac. Abr. (Execution) G.; 2 Hob., 2–59; Cro. Car., 75. If, as we have seen, the *capias* is here intended for the benefit of the bail, as well as the plaintiff, a writ of that kind against one only of two defendants might deprive the bail of important benefits; for if the *capias* had issued against both, strictly in pursuance of the judgment, the other defendant might have been forced to discharge the judgment, and then the bail would have been relieved. We are of the opinion that the *capias* against Lawson Henry upon a joint judgment, obtained in an action of trespass against Mary Henry and Lawson Henry, is void, as to the bail. There must be a new trial.

PER CURIAM. New trial awarded.

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(479) HOSEA REDMAN *vs.* HUMPHREY ROBERTS.

1. Where to an action of debt on a bond of one hundred dollars, the plea was that it was given to compromise an indictment for a misdemeanor, the acts and sayings of the son of the plaintiff, who did not appear to be an agent of the plaintiff, not in the presence of the plaintiff, are inadmissible as evidence.
2. Where there is no proof to establish a fact relied on, the jury should be so instructed by the court.

This was an appeal from the judgment of the Superior Court of Law of Iredell county, at Spring Term, 1841, his Honor Judge MANLY presiding. The plaintiff declared on a bond for one hundred dollars and proved its execution by the subscribing witness thereto. On the trial it was proved that the plaintiff had procured to be issued against the defendant a warrant for the penalty for trading with one of his slaves, in which the wardens of the poor of Iredell County were not named as parties plaintiffs. Upon the return of the warrant before the justice of the peace, who was the subscribing witness to the note sued on, the plaintiff alleged that the defendant had sold spirituous liquors

to his slave, and that he had drunk to such excess as to occasion his death, and claimed from the defendant between three and four hundred dollars as the amount of damages he had sustained. It was further proved that the defendant and plaintiff frequently attempted to compromise their dispute and had several private conferences for that purpose—that the plaintiff's son, either in the house of the justice of the peace, before whom the warrant was returned for trial, or in the yard, (the plaintiff not being present) read the act of Assembly, concerning the trading with slaves, to the defendant, (and the witness to this point swore that the section of the act, prescribing fine and imprisonment for the offence was read,) and advised the defendant to compromise with the plaintiff or it would be worse with him. Whereupon the parties immediately compromised, by the defendant giv-
(480) ing two bonds for one hundred dollars each, and the defendant, by order of the plaintiff, was discharged from the custody of the officer, who had arrested him and held him in custody with a guard of several men. The defendant then demanded a receipt in full or discharge in full from the plaintiff, who observed, in the presence of the justice and others, that all he wanted was his money. The testimony of the witness, who proved the reading of the act of Assembly, was objected to, but overruled by the court. His Honor charged the jury, that, if they were satisfied from the testimony that the bond sued on was executed with an understanding and agreement between the plaintiff and the defendant, that he should not be prosecuted for the *criminal* offence of trading with his slave, the bond was void, and the plaintiff could not recover; and this, whether this agreement constituted a part or the whole of the consideration for which it was given. But, on the contrary, if they believed that the bond was executed, and the consideration consisted of an agreement on the part of the plaintiff not to prosecute his suit for the penalty, or not to prosecute his suit for the loss of his slave, either or both, or was without consideration, they should find for the plaintiff. The jury found a verdict for the defendant.

The plaintiff moved for a new trial, 1st, because of misdirection by the court; 2d, because of the admission of improper testimony; 3d, because there was no evidence to justify the verdict. The motion was overruled and judgment against the plaintiff for costs, from which he appealed to the Supreme Court.

Caldwell for the plaintiff cited *Anderson* v. *Hawkins*, 1 Dev., 445.

Barringer and Alexander for the defendant cited *Collins* v.

Blantern, 2 Wils., 321; *Sharp* v. *Farmer*, 4 Dev., 122; *Goodman* v. *Smith*, 4 Dev., 450.

DANIEL, J. This is an action of debt on a bond for one hundred dollars. Plea, that it was given to compromise a misdemeanor. The plaintiff, heretofore, had warranted the
(481) defendant to recover the penalty of $100, for selling spirits to the plaintiff's slave, contrary to the act of Assembly. The plaintiff said he was also entitled to damages at common law for the injury he had sustained by the act of the defendant in letting his slave have spirits. When the warrant came on for trial before the justice, the defendant executed to the plaintiff two bonds, each for one hundred dollars, and the said warrant was dismissed. The defendant was not arrested, nor threatened to be arrested by the plaintiff, on a state warrant for a misdemeanor. The present action is brought on one of these bonds. On the trial of the issue, the defendant offered in evidence the acts and conduct of the plaintiff's son, in the absence of the father; to wit, in reading to the defendant the act of Assembly, making the selling of spirits to a slave a misdemeanor, and then telling the defendant to compromise with his father, or it would be worse for him. The plaintiff objected to this evidence, but it was admitted by the court, and upon this evidence, there was a verdict for the defendant and a judgment consequent thereon. A penalty of one hundred dollars, for trading with slaves, is given by the act of Assembly, Rev. St., c. 34, s. 75. The plaintiff had been proceeding against the defendant, under this section of the act. By the 77th section, moreover, of the same act, the trading and trafficking with slaves, as particularly described in the 75th section, are made indictable. The plaintiff had taken no step under the 77th section against the defendant, nor had he threatened any. The acts and sayings of his son, a third person, not an agent in the matter, and not in the presence of the plaintiff, were not *per se* admissible evidence against the plaintiff, and without them there was no proof, and the jury should have been so instructed. There must be a new trial.

PER CURIAM. New trial awarded.

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(482) Doe ex dem. WILLIAM DAVIS *vs.* MARY ANN CAMPBELL.

1. Where a defendant in ejectment is sued for thirteen contiguous tracts of land and the plaintiff proves that he was in the actual possession of one, and contends that, as the others were adjoining his possession must be considered as extending to them also; it is competent for the defendant

to give in evidence his own declaration, made at the time he took possession of the one tract, that he disclaimed any possession of the other twelve tracts.

2. Such declarations may be received, not to establish the verity of any fact asserted therein, but as either part of the fact itself, or characterising and illustrating the fact of possession.

3. This court, as a court of error, has no right to affirm in part and reverse in part an indivisible judgment.

This was an appeal from the judgment of the Superior Court of Law of Robeson County, at the Spring Term, 1841, his Honor Judge DICK presiding. The facts are sufficiently stated in the opinion delivered by the court.

Strange for the plaintiff.

No counsel for the defendant.

GASTON, J. This action was originally instituted against John Campbell, but, sometime after he had pleaded thereto, the present defendant was by a rule of court made defendant in the place of said John. The declaration contained thirteen distinct tracts, and the lessor of the plaintiff claimed title thereto under a purchase at execution sale against John Campbell and a conveyance of the sheriff in pursuance thereof. At the trial the plaintiff insisted that the said John, at the time this action was instituted, was in possession of all these tracts. He offered evidence to show that the said John cultivated parts of a fifty acre tract, and produced a diagram in which this and the other twelve tracts were exhibited as lying contiguous to each other, and proved by the surveyor, who made the diagram, that he had made it many years since by the direction of the said
(483) John, after he had purchased these tracts, and for the purpose of taking a deed therefor. No such deed, however, was exhibited nor any other evidence offered to show a possession by John Campbell of the 12 tracts. The defendant offered evidence to show, that while the said John thus cultivated the 50 acre tract he disclaimed any possession of the others. This testimony was rejected, and the court upon this evidence left it as a question of fact to the jury, whether he had possession, when the suit was brought, of all the tracts, and the jury found that he had.

We are of opinion that there was error in rejecting the testimony offered by the defendant. The evidence to establish possession of the 12 tracts was exceedingly weak. The possession of a part under a claim to the whole is, indeed, when no adverse occupation is shown, possession of the whole. But the only tes-

timony, tending to show that such possession was under a claim to the whole, was a diagram prepared upon a purchase not completed by a conveyance. Admit that this testimony had a tendency to connect the act of possession afterwards taken of one tract with a claim covering the other tracts, that act was nevertheless susceptible of a different explanation, and it seems to us that the declarations accompanying the act were pertinent to afford an explanation as to the extent of the claim then actually set up. The declarations were receivable in evidence not to establish the verity of any *facts asserted* therein, but as being either part of the fact or as characterising and illustrating the fact of possession. The very matter to be investigated was whether John Campbell then did or did not claim any of the tracts but that on which he had this *pedis positio*. A disclaimer of the others, while he held this possession, was of itself *a fact* having a direct bearing on the question—and it was proper to receive evidence of that fact. What *effect* the fact so testified, should have on the question under examination must be left to the sound judgment of the jury. They might regard the declaration as made with an intent to deceive, if there were circumstances which threw upon it just suspicion. They might deem it unworthy of attention, because in conflict with facts (484) of a more decisive and satisfactory character. But it was fit to be heard by them, as being apparently the spontaneous and natural expression of truth accompanying an act, the quality of which act they had to pass upon. It has been offered, on the part of the plaintiff, if the court should think there was error in rejecting this testimony, to accept a judgment here for the 50 acre tract only. But we have no discretion, as a court of error, to affirm in part and reverse in part an indivisible judgment. Although there be thirteen different tracts described in the declaration, the plaintiff has but one judgment, and if that be erroneous, we are bound to reverse it. We do not notice the other exceptions taken by the appellant except to say that, but for the one which we have particularly considered, we think that there would have been little difficulty in affirming the judgment. But on account of that error the judgment must be reversed, and a new trial awarded.

PER CURIAM. New trial awarded.

THOMAS W. WELLS *vs.* ROBERT MITCHELL & JESSE H. LINDSAY.

1. One partner cannot maintain an action of any kind against a person who purchases from a copartner the partnership effects, though such sale was made by the copartner in fraud of the partnership rights and to satisfy his own individual debt.

2. The cases of *Weed* v. *Richardson*, 2 Dev. & Bat., 535, and *Baird* v. *Baird*, 1 D. & B. Eq., 524, cited and approved.

This was an appeal from the judgment of the Superior Court of Guilford county, at Spring Term, 1841, his Honor
(485) Judge PEARSON presiding. The following is the case sent up to the Supreme Court:

This was an action of Trespass *vi & armis*, for an injury to personal property. The plaintiff adduced evidence, shewing that he was in possession of a work-shop, containing sundry articles of property belonging to the coach-making business, which was his trade, and that he had secured possession by nailing a board across the door of the house, and that the defendant, in his presence and against his remonstrance, pulled off the board and sold the articles of property at public auction, to sundry purchasers, who took them. And the defendants offered evidence, shewing that the plaintiff and one William P. Lindsay had carried on the coach-making business as partners in said shop, and that the articles aforesaid belonged to the firm, and that William P. Lindsay had absconded from the country, insolvent. They then produced a deed of trust from the said William P. Lindsay to the defendant, Mitchell, conveying all the articles aforesaid, the shop and lot, as the individual property of Lindsay, to satisfy numerous debts due from him individually to the other defendant, and justified the taking under the authority of that deed. The partnership aforesaid as to the articles of personal property being admitted, his Honor intimated his opinion that the action could not be maintained. The counsel for the plaintiff then offered to shew that there were partnership debts of said firm, equal in amount to the value of all the said property; that some of these debts the plaintiff had paid before, and some after, the sale, under the deed of trust as aforesaid; and that judgment had been obtained against him for others, which he had not been able to satisfy, by reason of this loss of the partnership effects; but his Honor holding that these facts would not enable the plaintiff to maintain this action, in submission to this opinion he suffered a nonsuit and appealed.

No counsel appeared in this court for the plaintiff.

J. T. Morehead, for the defendant, contended, 1st, that one partner has a right to sell and dispose of the goods of the firm. *Wilner* v. *Reed*, 3 John., 174. 2dly: The inter-
(486) est of one partner may be sold under execution, or one partner can assign his interest, which is a dissolution of the partnership. *Tredwell* v. *Riscoe*, 3 Dev., 50; *Buford* v. *Neeley*, 2 Dev. Eq., 481. 3d: Partners are tenants in common, and one tenant in common cannot maintain an action against his co-tenant, unless the joint property be destroyed. *Lowthrop* v. *Smith*, 1 Hay., 255; *Lucas* v. *Wasson*, 3 Dev., 398; *Brown* v. *Hedges*, 1 Salk., 290; *Fenning* v. *Greenville*, 1 Taunton, 241. 4thly: The facts stated in the case do not amount to a destruction. *Heath* v. *Hubbard*, 4 East, 110; *Barnardiston* v. *Chapman & al.*, 4 East, 121; *Holliday* v. *Camsel*, 1 Term R., 658.

RUFFIN, C. J. This court concurs in opinion with his Honor, that this action will not lie. It may be admitted that the sale of the goods of a firm by one of the partners in payment of his own debt, is *prima facie* an act of fraud, and wrong towards the other partners. But the question is, as to the remedy for that wrong. The case is different from that of an action brought against a partnership on a security given in the name of the firm by one of the partners for his own debt; in which case it is well settled that no action can be sustained. *Weed* v. *Richardson*, 2 Dev. & Bat., 535. The defence, however, is not that of the defrauding, but of the defrauded, partner; the latter being allowed to show that *he* is not bound by the security. The consequence of that, in the English law, is, that the plaintiff fails altogether, since by that law a joint action *ex contractu* must be sustained against all the defendants, or it cannot be against either. In this State it is different, and judgment may, by force of our statute, be entered against one or all the defendants in actions founded on contracts as in those for *torts*. Therefore, here there may be judgment against the partner who executed the instrument, while the other is discharged upon his defence, founded on the fraud. But although a fraud of this character constitutes a good defence in the case mentioned, there are insuperable difficulties in sustaining an action brought against the purchaser of goods of the firm from one of the partners.
(487) If the action be for the price of the goods, as upon a sale, it must be in the names of all the partners, including him who made the fraudulent sale; and there is an inconsistency and absurdity in the idea of the perpetrator of a fraud recovering, as one of the plaintiffs, in an action against a person

who co-operated in the fraud. In *Richmond* v *Heassy*, 1 Stark. Rep., 202, Lord Ellenborough held, that an action could not be maintained in the name of the three partners in a firm against the acceptor of bills drawn by the firm, when the defendant showed, that one of the firm—though in fraud of his partners—had engaged to provide for the bills. This was held upon the principle, that the partners were obliged to sue jointly; and that the release or other act of one, therefore, bound the rest, as well as himself. If the action be for the property itself, instead of the price, or be trover or trespass for taking or converting the property, the result must be the same. It is not necessary to express an opinion, whether such a purchaser could maintain an action againt the other partners, if they happened to get the goods into possession. Our enquiry is whether the partners or any of them can have an action against the purchaser; and in reason, an action sounding in torts stands, in such a case, on the same footing with one for the price. In *Jones* v. *Yates*, 9 Barn. & Cres., 532, where Sykes was a partner in two firms and took the money and bills belonging to one to pay his debt to the other, it was held, that neither assumpsit for the money nor trover for the bills would lie in the names of the partners to whom the money and bills had belonged, nor, they having become bankrupt, in the names of their assignees. In delivering the opinion of the Court of King's Bench, Lord Tenterden said, there was no instance in which a person had been allowed as plaintiff in a court of law, to rescind his own act, upon the ground that such an act was a fraud on some other person; whether the party sued in his own name only, or jointly with such other person. It may be supposed, as the present action is not brought in the name of the dishonest partner, but in that of the injured one alone and the defendant has not pleaded in abatement the
(488) non-joinder of the other partner, that it ought to be sustained, and the plaintiff be allowed to recover his adequate part of the value of the goods. But the rule requiring a plea in abatement, when an action of *tort* is brought by one joint-tenant or tenant in common, applies only to those cases, in which a joint action by all the persons having an interest would lie. If in such a case the defendant does not plead in abatement to the action brought by one tenant in common, the plaintiff recovers in that action according to his share; and, when the other sues for his share, the plea of non-joinder comes too late; since the action cannot then be sustained in another form, and unless it could be in that, the plaintiff might be entirely defeated,

by collision between his co-tenant and the defendant. But partners do not, in this respect, resemble tenants in common or ordinary joint-tenants. They cannot sever in an action; and one of them can, by a sale, pass the whole interest in a chattel belonging to the firm; whereas a sale by a tenant in common, or joint-tenant, passes only his interest; and his former co-tenant may still hold, or take possession, as part owner. In the case of *Jones* v. *Yates*, Lord Tenderden said, the property passed at law as against Sykes, (the fraudulent seller,) and there was no remedy at law for Bury (the other partner) to recover it back. He could not do so, without making Sykes a party. He thus agrees with Lord Ellenborough, that partners must sue jointly. The difference between tenants in common and partners is exhibited more plainly, when it is considered what remedies persons standing in those relations respectively have against each other. If a tenant in common destroy the chattel, or, as some think, if he sell the whole, his fellow may have trover or trespass against him. But it is clear, that between partners those actions do not lie; nor, indeed, any others at law. Every thing rests in confidence between partners, and lies in account while the partnership continues; and if one of them sell or take, or destroy the joint effects, all that can be done is to charge to him the value in account. The interest of partners in particular chattels cannot be determined by the number of partners or their shares of the profits; nor can one of them claim a division of specific articles. An account must be taken of the whole
(489) partnership, so as to ascertain the clear interest of each partner. *Baird* v. *Baird*, 1 Dev. & Bat. Eq., 524. Until such account be taken, it cannot be told, whether the partner, who, for his own benefit, sold or consumed the partnership property, was not justifiable, inasmuch as his interest in the joint stock may have exceeded the value of the property. If this action had, therefore, been brought against the fraudulent partner himself, it must have failed; and it might be, on the clearest ground of right and justice. So, for the same reason, it must against the vendee of that partner. As respects the right to the thing sold, the assignee stands in the shoes of his assignor. Besides, it is impossible to say what damages the plaintiff ought to recover. In an action by one tenant in common, he has only to show his interest, which is determinate, as a quarter or an half, and no plea in abatement being put in, the jury apportions the damages accordingly. But, as already mentioned, the interests of partners are complicated and depend upon the result of

all the accounts of the partnership. To take the accounts a court of law is unfit, and, indeed, incompetent; and, therefore, the jury cannot apportion the damages, which, as a partner, the plaintiff ought to recover. As a court of law thus finds itself incapable of ascertaining the rights of the parties and doing justice between them, it ought not to assume the jurisdiction for any purpose, but leave the whole subject to that tribunal, which can administer exact justice in the premises.

PER CURIAM. Judgment affirmed.

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(490) ALFRED HAFNER *vs.* JOHN IRWIN & al.

1. Though a debtor has a right, by the laws of this State, by a deed of trust, to convey all his property for the purpose of paying certain creditors in preference, yet there must be no condition, direct or indirect, controlling this application.
2. Such a deed must be *bona fide*, for the purpose it professes to have in view, and any provision by which a sale under it is unreasonably postponed, or by which the debtor is to obtain a benefit for himself or his family, or any agreement by which the transaction is to be kept secret, until the debtor has an opportunity of getting beyond the reach of process issued by his other creditors, or by which the deed is not to be registered until the other creditors sue or threaten to sue, will make the deed fraudulent, because it shows that one object of the deed was to hinder, defeat or defraud some creditors.
3. If only a part of the consideration of a deed is fraudulent against creditors, the whole deed is void.
4. The cases of *Moore* v. *Collins*, 3 Dev., 126; *Leadman* v. *Harris*, 3 Dev , 144, and *Kissam* v. *Edmunson*, 1 Ired. Eq. Rep., 180, cited and approved.

This was an appeal by defendant from the judgment of the Superior Court of Law of Mecklenburg County at the Fall Term, 1840, his Honor Judge PEARSON presiding. The following is the case as reported by the presiding Judge:

This was an action of trover. The plaintiff read a deed in trust by one Dwight, dated 13th of January and registered 18th of January, 1838, the purport of which deed was to convey to the plaintiff, as trustee, a large amount of personal property, in trust to sell the said property, after advertising twenty days in the neighborhood, and out of the proceeds of such sale to pay certain creditors named in the said deed; provided, however, that the said Dwight did not pay his said creditors on or before the 20th day of February next ensuing the date of the
(491) said deed; and if the said Dwight should so pay his said creditors, then the property was to be reconveyed to him. It was admitted that the debts named in the deed were *bona fide*

and due as set forth, and that after the deed was registered the defendant had sold most of the property as the property of Dwight. The defence was put on the ground that the deed was fraudulent. The defendants produced nine judgments before a justice of the peace for one hundred dollars each, and one for about eighty-seven dollars in favor of the defendants Irwin and Elms against Dwight, all dated 13th of January, 1838. Executions were taken out on these judgments on the 19th of January, and on the same day the property was levied on, and was afterwards sold under these executions and levies. One Snider swore that, on the night the deed in trust bears date, Dwight and Hafner took him into a back room, and at their request he signed his name as a subscribing witness to the deed. They did not tell him the contents of the deed, and held it so folded that he could not see. He was told he would never be called on to prove it. He left the room as soon as he witnessed the deed, and did not see whether Dwight or Hafner took it. One Springs swore that on the morning of the 14th of January he saw Hafner have the deed. On that morning Dwight started off from Charlotte where the transaction took place. Hafner took the property in possession and held it until the defendant's levy, and attended and forbade the sale, claiming under the deed in trust. The defendants called one Spencer. He swore that, after the deed was registered, the plaintiff told him "he did not intend to have any thing to do with it, as he believed it was only given to keep the workmen still, to give Dwight a chance to get off." It was admitted that Dwight had carried on an extensive business as carriage-maker in Charlotte, and most of the debts named were due to the workmen, including the plaintiff, who was one of the workmen. One Springs swore that he went with the plaintiff to look for Dwight, to get his debt saved and to get his horse; that Dwight had gone off; that they did not see Dwight, and returned on the 17th, after the deed was registered. The plaintiff told this witness that Dwight made the trust to
(492) quiet the workmen, until he could sell the property he had sent off, and that Dwight never intended the trust to come to light. This witness also swore that, a short time before Dwight went off, he had sent to the South carriages, &c., worth about $1,000, and his pretext for going was, to make sale of this property. Dwight carried no property with him, when he started; he was pursued, overtaken in Alabama, and the carriages, &c., seized. The plaintiff, as well as Curry, who is called a trustee in the deed, was insolvent when the deed was executed.

One Burnet swore that on the evening of the 13th of January, he met the plaintiff six miles from Charlotte. Talking about Dwight, the plaintiff told him he expected Dwight would run off, but said he had $150, and would hold on to that to save himself; he would not let Dwight see him that night. One Hughes swore that, on the night of the 13th January he saw the plaintiff go to Dwight's house; that after Dwight went off, the plaintiff asked this witness if he had heard any talk about attachments, and requested him to give him information as soon as he heard of any. On the evening of the 16th January, the plaintiff offered the witness five dollars for the hire of a horse to ride about nine miles. The plaintiff told him it was the understanding, that the trust was not to be registered, unless a fuss was made by the other creditors before Dwight got back. One Cross swore that, between the 13th and 18th of January, the plaintiff asked him if he had heard of any attachments being about to be taken out; the witness said no, but he had a great mind to take out one himself. The plaintiff said he believed Dwight would come back, and if he did, he might injure any one who had taken out an attachment. One McLelland swore that the plaintiff had requested him to let him know as soon as he heard any talk about attachments. The witness asked if he had not saved himself. The plaintiff replied, "I'll save myself by holding on to the job (an unfinished carriage)." The plaintiff then called several witnesses, who proved that the defendants Irwin and Elms lived in Charlotte, as did Dwight also; that the defendants' judgments were rendered in the upper part of the county, by a magistrate, who was taken into a private
(493) room for that purpose by the constable, another defendant; that the warrants were blank, when signed by the magistrate and filled up afterwards, and that Elms, one of the defendants, had directed the constable to take judgments at a distance from Charlotte, as Dwight wished it not to be known, lest it might alarm his other creditors. One Alexander, the register, swore that, on the night of the 18th, the plaintiff came to his house about 11 o'clock, and got the trust registered; he lived nine miles from Charlotte.

The plaintiff insisted that the judgments of the defendants were void, because the warrants had been signed in blank, but the court was of opinion that this objection could not be taken advantage of in this collateral manner. The defendant's counsel first insisted that the deed was fraudulent upon its face. The court was of opinion that there was nothing on the face of the

deed to make it proper for the court to declare it fraudulent and void.

The court charged, that if the evidence satisfied the jury that the deed was given *bona fide* to secure the debts named, the plaintiff would be entitled to a verdict, notwithstanding the defendants and other creditors should lose their debts, as the law allowed a debtor to prefer one creditor to another, at any time before a lien was created; but if the evidence satisfied the jury that the deed was not given to secure creditors, but with an intent to hinder, delay and defraud creditors, by covering the property, with a view to favor Dwight or to let him afterwards get the use of it, they would find for the defendants. The defendant's counsel moved the court to charge that, if the deed was executed with an understanding that it never was to be registered, such an understanding would make it fraudulent and void. The court charged, that the jury should first ascertain the fact, whether the understanding was, that the deed positively should never be registered, or merely that the deed should not be registered, provided Dwight returned before the 20th of February and paid up, unless, in the mean time, it became necessary to have it registered, on account of other creditors "making a fuss;" but, if there was a positive understanding that the deed should never be registered, that this could not make the
(494) deed fraudulent; for it could not have the effect to hinder, delay or defraud creditors, inasmuch as, until registered, it could have no effect, and could not keep off creditors or be at all in their way. To make a fraud there must be an intent and an act calculated to effect it. The defendant's counsel then moved the court to charge that if there was an understanding between Dwight and Hafner, who acted for the preferred creditors, that the deed should be kept secret and not registered, unless the other creditors made "a fuss," the deed would be fraudulent. The court charged that such an understanding would not make the deed fraudulent, for, until it was registered, it created no lien, and could not be in the way of others. If one creditor chooses to take a deed in trust and agrees not to have it registered, until the movement of other creditors makes it necessary, as the defendants insisted those represented by the plaintiff had done, or if a creditor chooses to take judgment and agrees to lie still, until the movement of other creditors makes it necessary to act, as the plaintiff insisted the defendants had done, it was in neither case a fraud; because there was no lien until the deed was registered, or the execution levied; there was no impediment in the

way of others. Creditors have a right to get in a state of readiness, provided they took no lien; but if they took a lien, and then lay by to favor the debtor, it would be fraud, because the lien would keep off others. The defendants' counsel then moved the court to charge that, if the plaintiff, who acted for himself and others, had knowledge of the fact that Dwight intended to run off, and took the deed, with an understanding that it should be kept secret and not registered, until Dwight had an opportunity to get out of the way, this would make the deed fraudulent. The court charged that such an understanding would not make the deed fraudulent, for if a creditor finds out that his debtor is about to abscond and applies to him for security, and the debtor agrees to give a deed in trust, provided the creditor will not expose him, or have the deed registered, until he gets off, and the creditor agrees to these terms for the purpose of saving himself, and does no positive act to aid the debtor in getting off, he would be justified in thus saving himself, although (495) other creditors might lose by it; for when the struggle is who shall save himself, the law tolerates many things, which it would not be right to do for the sake of gain. It was then a contest for a plank in a shipwreck. The jury found for the plaintiff. There was a motion for a new trial for error in the charge, and the motion was overruled. Judgment being rendered for the plaintiff, the defendant appealed.

Caldwell and *Alexander*, for the defendants, insisted that the plaintiff himself had declared substantially that the transaction was colorable—the deed was given to afford Dwight an opportunity to abscond—*that* intent was an intent to hinder and delay creditors. An older execution is postponed in favor of a younger one, if indulgence be given till others push. *Palmer* v. *Clark*, 2 Dev., 354; *Sheriff of Halifax* v. *Carter*, 1 Hawks, 403. So if a sheriff indulges, he loses his lien. *Roberts* v. *Scales, ante*, p. 88. A deed in trust not accepted by the *cestuis que trust* may be revoked by the maker. *Actor* v. *Woodgate*, 8 Cond. Ch. Rep., 97. And they commented at large upon the circumstances of this case to shew the fraudulent intent of the parties to the deed.

Barringer, for the plaintiff, replied, also dwelling at large upon the facts of the case, and contending that no fraudulent intent had been shewn to make the deed void. He commented on the authorities cited for the defendants—and relied upon the following authorities on his side: *Holbird* v. *Anderson*, 5 Term Rep., 235; *Pickstock* v. *Lyster*, 3 Maule. & Selw., 371; *Goss* v. *Neale*, 16 Comm. Law Rep., 387; *Twyne's* case, 3 Co., 83; *Cun-*

ningham v. *Freeborn*, 11 Wendell, 240; *Wilder* v. *Winne*, 6 Cow., 284; *Bissell* v. *Hopkins*, 3 Cow., 166; *Wintringham* v. *Lasay*, 7 Cow., 735; *Brooks* v. *Marbury*, 11 Wheat., 78; same case, 7 Wheat., 556; *Davidson* v. *Cowan*, 1 Dev. Eq., 470; *Pike* v. *Armistead*, 1 Dev. Eq., 110.

GASTON, J. The court concurs in the opinion, declared in the Superior Court, that the deed, under which the plaintiff sets up title, is not upon its face fraudulent. It purports to be
(496) a conveyance from Thomas Dwight to the plaintiff, to the intent that unless payment be made of certain enumerated debts of the said Dwight, within forty days after the execution thereof, the whole of the property shall be sold and the proceeds applied to the satisfaction of said debts, and that if the said Dwight shall, within the forty days, pay off the said debts, the plaintiff shall re-convey the property to him. Assuming these debts to be *bona fide*, there seems nothing in this arrangement, inconsistent with a fair appropriation of the property to the security of creditors. Where the interval, between the date of such an instrument and the day appointed therein for the sale of the property conveyed, appears unreasonably long, this circumstance may properly be insisted on as indicative of an intent to shield the property for a time for the use of the debtor, and to that extent as having been made for his case or favor; and if that intent, under all the circumstances of the case, be *found*, then indeed it follows as a consequence in law that the conveyance is fraudulent. There may be an interval, so manifestly unnecessary for any honest purpose, as to justify the *court* in so pronouncing—but in our judgment *that* allowed in this deed could at most be but submitted to the jury as a circumstance, for which, in connection with all the parts of the case, they were to infer the actual intent of the parties.

Nor do we see any error in the general instruction or charge of his Honor, that if the deed was given *bona fide* to secure the debts named, the plaintiff would be entitled to a verdict, notwithstanding the other creditors of the plaintiff should, by reason of said deed, be defeated, delayed or hindered in the collection of their debts. Every conveyance of property by an insolvent or embarrassed man, to the exclusive satisfaction of the claims of some of his creditors, has necessarily a tendency to defeat or hinder his other creditors in the collection of their demands. But if the *sole* purpose of such a conveyance be the discharge of an honest debt, it does not fall under the operation of the statute against fraudulent conveyances. It is not

embraced within its words, which apply only to such as are "contrived of malice, fraud, collusion or covin, to the end, purpose, and intent to delay, hinder and defraud creditors." (497) So long as a debtor remains in contemplation of law the absolute owner of property, it cannot be said of an appropriation of that property exclusively to the purpose of paying a debt, that it is a contrivance "of malice, fraud, covin or collusion to the end, purpose and intent to delay, hinder and defraud other creditors." He has exerted a power over property, which the law gives to him as owner—and has exerted it for a purpose, which is not in law wrongful. This construction of the enacting part of the statute is forfeited by the provision contained in it that the statute "shall not extend to or be construed to impeach, defeat or make void any conveyance or assurance *bona fide* made upon and for good consideration to any person not having notice of such fraud." Rev. St., ch. 50, sect. 1st and 3rd. It is perfectly settled in England, except in cases affected by the bankrupt system, and with us (who have no bankrupt system) in all cases, that a debtor, whatever be the extent of his embarrassments, may devote any part or the whole of his property to the payment of certain creditors in preference of others, and that no one has a right to enquire whether the objects of this preference are more meritorious than those left to suffer. *Moore* v. *Collins*, 3 Dev. 126. But it is equally clear that if it be a part of the purpose of a conveyance or assurance for the security or satisfaction of creditors, that it shall avail or be used for the ease or favor of the debtor, such a conveyance or assurance does fall under the enactments of the statute, because, to the extent of that purpose, it is a contrivance of malice and covin, to the intent to hinder other creditors in the collection of their just demands. *Leadman* v. *Harris*, 3 Dev., 144; *Kissam* v. *Edmundson*, 1 Iredell's Eq. Rts., 180. The cases in which this doctrine has been heretofore adjudged are those in which there was an intent, open or covert, that the debtor should retain for a definite or indefinite time the beneficial enjoyment of the property—or should receive a portion of the profits or proceeds thereof—or should retain a control over the property conveyed so as to enable him to make preferences thereafter—or whereby the trustee or debtor might be enabled to coerce creditors into a submission to terms inconsistent with their legal rights. (498) None of these are in point with the case now before us, but from them we think a principle is to be extracted, which it is our duty to cause to be faithfully applied to the case

before us. That principle is this: that the *whole* purpose of the parties to such conveyance must be the devotion of the property *bona fide* to the satisfaction of the preferred creditors, and no part of that purpose the hindering or delaying of creditors, except so far as such hindrance or delay is the unavoidable consequence of the preference so given. Every contrivance to *the intent* to hinder creditors—*directed to that end*—is "malicious" that is to say, wicked. Where such hindrance is but an incidental consequence of an act not directed to that end, and *bona fide* done with another and rightful intent, it may be regretted as an unfortunate result, but cannot be held to impart to the act a wicked or malicious intent. But if the hindrance of creditors form any part of the actual intent of the act done, so far the act is as against them a wicked or malicious contrivance—and it is not to be questioned that a conveyance or assurance, tainted in part with a malicious or fraudulent intent, is by the statute made void as against creditors *in toto*.

The testimony given upon the trial was such as to warrant the defendants in praying the specific instructions, for which they asked, if in law such instructions were correct. There certainly was evidence tending to shew that it was a condition of this deed, as understood between the parties thereto, that it should not be registered nor put in use but kept a secret from the world, until after the 20th of February ensuing the date, that is to say, the day before which a sale was to be forborne, unless such registration became necessary in order to hinder the creditors of the debtor from obtaining satisfaction out of the property. There was also evidence tending to show that it was a further part of the *agreement between the parties*, that the transaction should be kept secret, at all events until the debtor should escape beyond the reach of the process of his creditors. For the purpose, therefore, of testing the legality of the special instructions asked we will suppose that this agreement appeared *in extenso*
(499) upon the face of the instrument, as a condition thereof, and enquire, whether so appearing, it would not manifest that the instrument was contrived of malice, to the intent to hinder and delay creditors of their just and lawful actions and debts? It seems to us that the answer to this question must be in the affirmative. The instrument, excluding the condition, would purport to be an absolute conveyance of the property by Dwight for the satisfaction of his creditors—while the condition would shew, that, *in truth*, and according to *the understanding of the parties*, it was *to remain his property* until the 20th of Feb-

ruary, unless his creditors should attempt to regard it as such—and then the conveyance was to be put in use in order to repel these attempts. The defeating of these creditors is the purpose, which is to call the conveyance into activity—the direct intent of the conveyance is to shield the debtor's property from the creditors, and the conveyance itself is a contrivance, whereby to carry this intent into execution and to accomplish this purpose. But moreover, in the case supposed, a part of the price of the deed is the secrecy of the plaintiff, in regard to the debtor's scheme of running away. We need not, and cannot, lay down as a rule of law, that those, who take securities from a debtor about to abscond, must apprise creditors of his intention to place himself beyond their reach, under penalty of forfeiting such securities—but we feel ourselves justified in holding that when secrecy is part of the *consideration* of such securities—the securities are contaminated thereby, and ought not to be regarded as given *bona fide*.

This view is, we think, corroborated by many obvious and very important considerations of public policy. Among the most severe trials, to which the honesty of man can be subjected, is that of inability, with all his means, to meet all his debts. He is assailed by temptations of interest, of shame, of affection to wander from the straight line of duty, and he is entrusted by the law with a dominion over what is in justice the property of his creditors, which, if they are permitted to become *bidders* for his favor, converts them also into tempters to dishonesty. It is enough, perhaps more than enough, for human infirmity,
(500) that the debtor shall be allowed, under these distressing circumstances, to select acording to his unbribed judgment among his creditors for those who merit a preference, and to make a simple and unconditional appropriation of his property to the payment of the claims. But to allow him to negotiate for terms with them—to seek out those, who will be most favorable to him, either in the way of profit or commerce, direct or indirect—to stipulate openly or covertly with regard to the property conveyed other than its appropriation to the purposes of the conveyance—would be injurious to the best interests of the community.

Much has been done to obviate the mischiefs, occasioned by these assignments of insolvent men, by the act of Assembly, which denies to them efficacy, as against creditors, but from the time of registration. This act is a legislative declaration, that secrecy with respect to such instruments is against public policy.

The courts of justice ought to act in furtherance of this policy. They should regard all devices and shifts, intended of purpose to surprise creditors by secret conveyances in trust, although they do not fall within the letter of the statute, and, therefore, are not avoided thereby, as contrivances denounced by the law.

The time has come when, if possible, some plain rule should be laid down, in regard to these conveyances, "so simple that honest debtors cannot mistake it, and fraudulent ones will be deterred from its violation by the certainty of defeat," (per Southerland, Justice, *Enover* v. *Wakeman*, 11 Wen., 203,) and that rule is this, that the debtor may thereby make an appropriation of his property to the payment of particular creditors—but there must be no condition, direct or indirect, controlling this application. All over and above what is necessary for the devotion of the property to the payment of the debts "cometh of evil."

The judgment is reversed and a new trial awarded.

PER CURIAM. New trial awarded.

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(501) PETER ADAMS *vs.* DAN ALEXANDER & WILLIAM F. ALEXANDER.

1. It is no objection to a man's taking the insolvent debtor's oath, under our act of Assembly, that he has conveyed, in a deed of trust to satisfy certain creditors, an amount of property, greater in value than the amount of debts secured by the deed, when he sets forth the deed in his schedule and surrenders all his resulting interests.
2. When one, who applies to take the insolvent debtor's oath, upon rendering a schedule, sets forth in his schedule that he has made a deed in trust of certain property to satisfy certain creditors and surrenders all his interests in the property mentioned in such deed, it is still competent for the opposing creditor to have an issue made up whether the said deed is not fraudulent, and if found fraudulent by a jury, to cause the debtor to be imprisoned, until he surrenders the property itself.

This was an appeal from the judgment of the Superior Court of Law of Guilford County, at Spring Term, 1841, his Honor Judge PEARSON presiding. The defendants were arrested on a *ca. sa.* issued on a judgment obtained against them by Peter Adams. Having entered into bond, given due notice and filed their schedule, all according to the act of Assembly for the relief of insolvent debtors, they appeared at court and prayed to be admitted to take the oath prescribed by the act. In their schedules respectively, among other things, each of them set forth a deed of trust, which he had made, conveying certain property to a trustee, to be sold for the payment of certain debts; and each of them made a surrender in the following words, to wit: "I

hereby surrender all interest which I have or can have, directly or indirectly, in and to all the property and estate conveyed in the deed of trust above referred to; and I have herein and hereby surrendered all the estate, belonging to me and now recollected by me, and I furthermore surrender all property, interest and title, to which I may be entitled, directly or indirectly, on earth, which may not now be recalled by me." The plaintiff, Peter Adams, suggested fraud on the part of the defendants,
(502) and offered, under the direction of the court, to make up the following issues:

1st. The defendants are guilty of fraud by making fraudulent conveyances of their property to delay, let and hinder the plaintiff in the collection of his money.

2d. The defendants are guilty of fraud in concealment of debts and property, sufficient in value to pay the debt or debts with which they are charged in execution; and the plaintiff offered to make the following specifications of fraud: 1st, that the defendants have and own an interest in the property described in the several schedules of more than the value of the debt or debts, with which they are charged in execution, which they have conveyed in trust, whereby to secure the same, and expect profit and advantage, whereby to defraud or deceive the plaintiff. 2dly. The defendants have money, which, added to the estate or property described in their several schedules filed, and copies of trust deeds filed, makes a sum greater than the debts they justly and truly owe, including the plaintiff's debt. 3dly. That the defendants executed, contrived and devised the deeds of trust (copies of which are filed) of malice, fraud, covin or collusion, to the end and purpose and intent to delay, hinder and defraud the plaintiff, to prevent their property from being made subject to the payment of the plaintiff's debt within a reasonable time, and to secure the enjoyment to themselves. 4thly. That the defendant Dan Alexander has one hundred shares in the State Bank of North Carolina; and the said Dan Alexander has conveyed the said hundred shares fraudulently, with a view, purpose and intent as described in third specification.

But it was the opinion of the court that it was not material, whether the defendants had set forth in the schedule, property, money, or effects amounting in value to more than sufficient to pay all the debts they justly and truly owed, including the plaintiff's debt, which issue the plaintiff's counsel insisted on submitting to the jury. But supposing that to be the case, it was, in the opinion of the court, no reason why the defendants, being

taken on a *ca. sa.*, for a debt contracted in the year 1839,
(503) might not be permitted to file schedules of their property and take the oath. The court was also of opinion that it was not material, whether the defendants, or either of them, were guilty of fraud, by making fraudulent conveyances of their property to delay, let or hinder the plaintiff in the collection of his money; which issue the plaintiff's counsel proposed to be submitted to a jury, and under which he proposed to shew, that, in October, 1840, the defendant Dan Alexander made a deed of trust to one William S. Alexander, including all of his property, to an amount much greater than the debts mentioned in the said deed of trust, with an intent to hinder, delay and defraud the plaintiff; and to shew, that, in March, 1841, the other defendant, William S. Alexander, made a deed of trust to one Harris, including all of his property, to an amount much greater than the debts mentioned in the said deed of trust, with intent to hinder, delay and defraud the plaintiff. But even supposing such to be the fact, it was, in the opinion of the court, no good reason why the defendants, taken under a *ca. sa.* for a debt contracted in 1839, might not be permitted to file their schedules, setting out the trust resulting to them, and take the oath. Under the direction of the court, the following issue was submitted to the jury: "Have the defendants, or either of them, concealed any property, money or effects belonging to them or either of them, or held by any person or persons in trust for them or either of them? and have they omitted to set forth the same in their schedules respectively? and do the schedules now filed by them respectively set forth and make a full disclosure and discovery of all the property, money and effects belonging to them, or either of them, or property and money held by any person or persons in trust for them or either of them?" The jury found the issue in favor of the defendants. Whereupon the defendants' counsel moved that they be permitted to take the oath; but the plaintiff, being dissatisfied with the opinion of the court, as to the materiality of the issues proposed by him in addition to the issue submitted, prayed an appeal to the Supreme Court, which was granted.

J. T. Morehead for the plaintiff.
Iredell for the defendants.

(504) RUFFIN, C. J. The defendants were arrested upon a *capias ad satisfaciendum*, at the suit of the plaintiff, and gave bond for their appearance, to take the benefit of the act for

the relief of insolvent debtors. Each of the defendants filed a schedule, and gave the proper notices of his intention to avail himself of the benefit of the act; and moved the court to swear to his schedule and be discharged. On the 13th day of October, 1840, D. Alexander conveyed to a trustee lands and slaves, and a number of other chattels, in trust, to sell after the first day of January, 1842, and out of the proceeds pay certain debts in the deed enumerated; and in the event of the said debts being paid, without a sale of the property, or that any part should remain unsold, after paying the debts, then in trust to re-convey to the said D. Alexander. On the 25th of March, 1841, the other party, W. F. Alexander, made a similar deed, whereby he conveyed lands and assigned his debts to a trustee upon the like trusts. Each of the defendants annexed to his schedule a copy of the deed of trust by him made; and, in the schedule, each assigned "all the interest resulting to him in the property, or proceeds of sale thereof, conveyed by the deed of trust, of which the copy is filed herewith, after satisfying the debts secured thereby." The plaintiff opposed the motion of the defendants, and suggested that they ought not to be discharged, because the defendants had respectively set forth, in their schedules, property, money and effects of value more than sufficient to pay all the debts they justly owed, including that to the plaintiff. And the plaintiff prayed the court to direct an issue to be made up thereon and tried by a jury. But the court refused the motion of the plaintiff, because, admitting the suggestion to be true, it furnished no reason, why the debtors should not schedule or assign their property in this proceeding and take the oath, and be discharged.

The plaintiff also suggested fraud and concealment of property and effects by the defendants; and, particularly, that the deeds of trust, made by the defendants respectively and referred to in their schedules, were made with intent to defraud and delay the plaintiff and other creditors of the recovery of their
(505) debts to reserve and secure a benefit to themselves. And the plaintiff prayed the court to direct issues accordingly to be made up as to each of the said deeds, and tried by a jury. But the court was of opinion, that it was not material, whether either of the deeds was fraudulent or not; and, supposing it to be so, that it furnished no good reason, why the defendants might not be permitted to file schedules, setting out therein the trusts resulting to them, and take the oath; and therefore the court refused this prayer of the plaintiff also.

The court then directed an issue in the following form: Hath the defendants or either of them concealed any property, money or effects, belonging to them or either of them, or held by any person in trust for them or him, and omitted to set forth the same in the respective schedules, by the defendants filed? And do or do not the said schedules respectively set forth and make a full disclosure and discovery of all the property, money and effects belonging to the defendants respectively, or held by any person in trust for them or either of them? Upon that issue, the jury found in favor of the defendants; and the plaintiff, being dissatisfied with the opinions of the court before mentioned, appealed.

Upon the first point made at the trial, this court entertains the same opinion his Honor gave. It is said, on the contrary, that the terms of the oath, and all the provisions of the act, taken together, show, that only the case of a debtor, who is insolvent, was in the contemplation of the legislature; and therefore a person, who is able to pay his debts and puts into his schedule more property than will pay all of them, is not within the act. It is very clear, that no other case was thought of, but that of insolvency; because it was not expected, that any person, fully able to pay all his debts *would* apply to take the benefit of the act. But there is nothing to prevent one in that situation doing so, should he happen to be under the necessity of making the application, as the means of being enlarged from imprisonment. The oath is, that the schedule is true, and that the debtor has not "any *other* estate" of the value of the debt. The object of the law is to enforce the surrender of all the debtor's property, so that the debt may be paid altogether, or as far as the
(506) property will go. When the surrender of *all* is made, whether that be little or much, the debtor is to be enlarged. And it certainly never can be imputed as a crime to the debtor, for which he is to be continued in prison, that he has surrendered too much property; more than will pay all his debts. It will not indeed often occur, but a case may easily be conceived, where a stranger, whose property was in a distant country and unknown here, might find the surrender of it the only means of escaping the jail, because he could not immediately find a purchaser. It is not uncommon where the system of bankruptcy is established, that although the debtor could not immediately command his money, and so was properly declared bankrupt, for not punctually paying his debts, yet his estate, when got in by the assignees, pays twenty shillings in the pound

and leaves a surplus for the bankrupt himself. The proceedings under our act upon scheduled property are of the nature of an assignment in bankruptcy; and the same principles are applicable to both in the point now under consideration.

Upon the next question, the opinion of this court differs from that of his Honor. The fourth section of the act for the relief of insolvent debtors, Rev. St., ch. 58, requires the debtor "to set forth an exact account of his estate and all other circumstances relating thereto;" and by the 11th section all the estate, effects and debts, contained in the schedule, are vested in the sheriff, who is to sell the estate and collect the monies and pay the whole into court, to be distributed among all the creditors, as mentioned in the next section. It is to be remembered also, that the 10th section, which gives the issue to the creditor, enacts, that, if the jury finds any fraud or concealment of effects, the debtor shall be adjudged to be imprisoned, until he make a full and fair disclosure, by filing a new schedule; and, then, by giving a new notice, he may at the next court take the oath and be let out of prison. This last provision was introduced by the act of 1830; that of 1822 having left it uncertain, how long a person, found guilty of a fraud, might be kept in jail, or whether he could be discharged at all as an insolvent. The provision as now existing shews a just reprobation and denounces a
(507) reasonable penalty on dishonest practices in debtors. They are not entirely deprived of the privilege of being discharged, by taking the oath of insolvency; but they are only admitted to that privilege, at the end of an imprisonment from one term of the court to the other, and then upon filing a true and unimpeached schedule. In the present case, therefore, the plaintiff had a right to impeach the schedule, for the two-fold purpose of praying his debtors, if found guilty of fraud and of not giving exact account of their estates required by the act, into the custody of the sheriff—there to remain until the next court, as a just punishment for their covin; and also of having all the estate, which ought legally to be applied to the satisfaction of the plaintiff and the other creditors, vested in the sheriff for that purpose. Now, this can only be effected by having a new schedule and including therein, the property omitted in the first, or fraudulently conveyed or concealed. For the statute does not merely, upon the finding of the fraud, vest in the sheriff the property in respect to which the fraud has been found; but it vests in the sheriff "all the lands contained in the schedule, and all the goods and chattels and debts and demands set forth and

described in the schedule." Hence, only those interests, particularly scheduled, vest in the sheriff, or enure to the benefit of the creditors. And hence, also, the necessity of a new schedule after fraud found, and a new issue on it. Then it remains to be considered, what interests or estates ought to be scheduled? Upon that point the court is of opinion, both from the reason of the thing, and from the particular provisions of the statute, that the schedule ought to disclose every interest, which would have been liable to the creditor on *fi. fa.*, or ought in law or equity to be subject to the creditor's demand. If, therefore, the debtor has made a deed of trust in fraud of some of his creditors, it is not sufficient that the schedule should contain *the resulting trust* of the maker of the deed. If the deed is fraudulent, it is void as against the creditor, and he is not confined to the resulting trust, but may take the property, the *corpus* itself. Here the debtors have scheduled only the resulting trust, which affirms the other trusts to be *bona fide* and good, and is
(508) an assignment of the surplus only after all the other purposes of the deed have been answered. And that was right, supposing the deeds of trust to be *bona fide* and valid conveyances. But they may not be, and the plaintiff tenders an issue that they are not; and if they be not, then the schedule ought to set forth *the property itself*, as being in the debtor, notwithstanding the deed made by him. The property, it is true, is not in him, as between himself and his alienee; but it is in him for the purposes of his creditor, and therefore ought to be inserted in the schedule, that the sheriff, as his assignee by operation of law, may bring an action against the debtor's alienee to try the validity of the deed. This will be the clearer, if we suppose that instead of a deed of trust, this were an absolute deed, and found by the jury, on an issue, to be fraudulent. In that case, the statute says, the party shall make a new schedule, and be imprisoned, until he shall make it. Why is it to be made? Unquestionably, for the purpose of including in it, among other things, the property fraudulently conveyed, and omitted in the former schedule; so that, under the new assignment, the sheriff may assert a right to that property for the benefit of the creditors. Under the schedule, as it is, the sheriff can only claim to be assignee of the resulting trust. Whereas, if the deed be fraudulent, the whole property, as conveyed by the deeds, ought to be taken away from the trustees, and vested in the sheriff. If this were not so, a voluntary and fraudulent conveyance would be affirmed as against creditors, merely upon the ground, that

the fraudulent donor was bound by his deed, and took the oath of insolvency, without including that property in his schedule; which, we think, can not be. It is analogous to the common case in England of an assignee in bankruptcy recovering property, which the debtor, in contemplation of bankruptcy, passed to a favoured creditor in fraud of the rights of the other creditors under the bankrupt law. The conveyance being in fraud of the law, which provides for an equal distribution of the bankrupt's estate, it is held to be void; and, although the debtor could not recover the property conveyed by him, his assignees may. The same law must be here, and for the like reason.

(509) Therefore, assuming the deeds to be fraudulent, as his Honor did, the defendants could not be discharged, upon an assignment of their resulting trusts, but should have been required to assign the estates conveyed in the deeds; and, to ascertain the true character of those conveyances, the plaintiff had a right to have an issue tried, as tendered by him.

It is true, perhaps, the jury might have found all that was necessary for the plaintiff upon the issue, as framed by the court. But it must be supposed, the court gave to the jury by way of instructions the same opinion, which was delivered on the plaintiff's motion for a special issue on the deeds, and, therefore, that the same error pervaded the trial throughout. Under this view of the case, therefore, we deem it proper to reverse the decision, and direct the verdict to be set aside and a *venire de novo* to try the issue before made up, with liberty to the plaintiff to have the other issue, before asked by him, also tried, and such others as the Superior Court may further allow.

PER CURIAM. New trial awarded.

Den ex dem. CORNELIUS FLYNN *vs.* JOHN W. WILLIAMS.

1. Where one, who has an *estate of inheritance in possession*, as, in this case, a *fee conditional*, the condition being that if he died without leaving issue living at his death, the estate should go over, and sells the same, and binds himself and his heirs in a general warranty; his heirs are bound, whether the warranty be lineal or collateral, and whether they have assets by descent or not.
2. A purchaser at an execution sale acquires no other or further title, than the defendant in the execution had at the time of the sale.

This was an action of ejectment, tried at Spring Term, 1841, of Beaufort Superior Court of Law, before his Honor

(510) Judge BAILEY. The lessor of the plaintiff claimed title under a deed, dated the 14th of September, 1826,

from Joseph R. Hanrihan to said lessor, and proved that, in 1838, the defendant rented the turpentine boxes on the said land, from Joseph R. Hoyle, who professed to act as the agent of the heirs of the said Joseph R. Hanrihan the said Joseph being then dead; and proved, further, that the defendant was in possession of the land at the issuing of this writ. The lessor of the plaintiff offered in evidence the will of Walter Hanrihan, by which an estate was limited to William K. Hanrihan, upon a contingency therein mentioned. The will was proved at May Term, 1823, of Beaufort County Court, and so much of it as relates to this question, is as follows: "I give and devise to my son, Joseph R. Hanrihan, all my possessions on Blount's creek, &c." "In case my son, Joseph R. Hanrihan, should leave no issue at the time of his death, I then devise the aforesaid lands, already given him, to my son, William K. Hanrihan." The lessor of the plaintiff also proved, that William K. Hanrihan, named in the said will, died in 1834; that Joseph R. Hanrihan was the sole heir of the said William, and that the said Joseph died in 1837, leaving no issue. The defendant then offered in evidence a judgment obtained at Fall Term, 1836, of Beaufort Superior Court of Law, for $800, by Andrew Christie, against the said Joseph R. Hanrihan, in a suit which was pending in said court at the date of the deed, from the said Joseph to the said Flynn, upon which judgment execution issued, under which the lands in question were sold and bought by said Christie. It appeared that the fee simple value of the lands conveyed by said Joseph to the lessor of the plaintiff, at the time of said conveyance, was six thousand six hundred dollars, and their annual value between five and six hundred dollars. The consideration expressed in the deed to Flynn, was five hundred and thirty dollars. The suit of Christie was brought to recover damages for an assault and battery.

The defendant contended that in law the deed to Flynn, of September, 1826, was fraudulent, on account of the inadequacy of the consideration, and requested his Honor so to instruct the jury, which instruction was declined. The defendant
(511) further contended, that the said deed did not convey the fee simple in said lands, but that the estate of Flynn therein ceased by the death of Joseph R. Hanrihan; the said deed was fraudulent, and therefore defendant was not estopped to shew that the title of Joseph R. Hanrihan was divested out of the lessor of the plaintiff by the judgment, execution and sheriff's deed to Christie. It was proved that after the deed to

Christie, to-wit, in 1828, the lessor of the plaintiff surrendered the possession of the said lands to the agent of Christie; and the Judge was requested to charge that thereby the possession was changed and was in Christie, whereby the lessor could not recover in this action. The subscribing witnesses to the deed from Joseph R. Hanrihan stated, that no money was paid, as far as they knew, as a consideration for the said conveyance. The defendant contended, further, that a demand of possession before action brought should be shewn.

His Honor charged the jury, that if the defendant claimed under the heirs of Joseph R. Hanrihan, as stated herein, he was estopped to allege that the deed from the said Hanrihan to the lessor of the plaintiff, was fraudulent as against Christie, and further, could not shew that the title was in Christie, because he deduced no title from Christie to himself. His Honor instructed the jury, that, upon the death of William K. Hanrihan, the fee simple in the said land vested in the lessor of the plaintiff; and that the said Joseph R. Hanrihan and his heirs, and those claiming under him, were estopped to deny the same, and that no demand of possession was necessary, if the defendant claimed title in himself. His Honor further charged the jury, that the defendant could not avail himself of this surrender of possession, because he did not claim under Christie. Under these instructions, the jury found a verdict for the plaintiff, judgment was rendered hereon, and the defendant appealed to the Supreme Court.

No counsel for the plaintiff.

J. H. Bryan for the defendant.

(512) DANIEL, J. This was an action of ejectment. Walter Hanrihan devised the land in controversy to his son, Joseph R. Hanrihan; the testator in his will then says, "In case my son, Joseph R. Hanrihan, leave no issue at the time of his death, I then devise the aforesaid land already given him, to my son, William K. Hanrihan." Joseph R. Hanrihan, in the year 1826, conveyed the land in fee by deed of bargain and sale, to the lessor of the plaintiff, and bound himself and his heirs by general warranty. William died in 1834, and Joseph was his only heir at law. And Joseph died in 1837, without issue. The defendant on the trial contended that, as Joseph had but a conditional fee, at the time he made the conveyance to the lessor of the plaintiff, the executory devise in fee over to William, which descended on Joseph, in 1834, on the

death of William, did not pass by the said deed to the lessor of the plaintiff, but became vested in the heirs at law of Joseph, when he died without issue, in 1837. The Judge was of the opinion, that the deed of 1826 operated as an estoppel to the heirs of Joseph, and that they had no title. We will not now stop to enquire, whether the estoppel, by force of the deed of 1826, extended any farther than the measure and extent of the estate, which the bargainor then had in the land; as we are of the opinion that the heirs of Joseph are certainly rebutted by the warranty, which descended on them. A lineal warranty is where the heir derived, or might by possibility have derived, his title to the land warranted, either from or through the ancestor, who made the warranty. Littleton S., 703, 711; 2 Blac. Com., 301; 1 Shep. Touch., 336, (Preston's Edit.) And in all cases of a lineal warranty, if the right of the estate to be barred be the right of an estate in fee simple, it is a bar with or without any assets; for the rule is that, as to him that demandeth fee simple by any of his ancestors, he shall be barred and bound by lineal warranty that doth descend upon him, unless he be exempted by some statute. 1 Shep. Touch., c. 337, 338. In this case it is the fee simple that is barred by the warranty descended on the heirs. But, suppose it be said that, as the limitation over to William, never *vested* in Joseph, the claimants are heirs of William as to the land which vested in
(513) them on the death of Joseph, without issue, (a question we do not decide,) still, if the warranty be either lineal or collateral, the heirs here to the land are also heirs to the warranty, and they are barred either with or without assets; as Joseph, at the time the deed was made, was in possession, having an estate of inheritance in the land—he had a *fee conditional.* By the Statute of 4 Ann. C., 16, all collateral warranties, made by tenants for life, and persons not having an estate *of inheritance in possession,* shall be void against the heir. But if A. be tenant in tail in possession, remainder to B. his next brother: and A. makes a feoffment or levies a *fine,* with warranty from him and his heirs, and die without issue, this is a collateral warranty, which shall bar B., notwithstanding the statute, though no assets descend. 1 Shep. Touch., 341, (note 23, by Preston.) And, whether the warranty be lineal or collateral, the heirs in the present case are rebutted and forever barred, with or without assets.

Secondly; the defendant also contended, that the title to the land was in one Christie. He offered evidence to shew that, at

the time Joseph R. Hanrihan executed the deed to the plaintiff, Christie had a suit for assault and battery pending against him—that Christie obtained a judgment, issued an execution, levied on this land, (alleging that it had been conveyed to defeat his recovery,) had it sold, became the purchaser, that the sheriff executed to him a deed, and that the present lessor of the plaintiff surrendered to him the possession. The Judge was of the opinion, that, as the defendant claimed under the heirs of Joseph R. Hanrihan, he was estopped to allege that the deed was fraudulent as against Christie; and, further, that he could not shew that the title was in Christie, because he deduced no title from Christie to himself. Without examining these positions, it is enough to say that the evidence so offered was altogether immaterial; for, assuredly, Christie could not acquire under his purchase any other or further estate, than Joseph R. Hanrihan, the defendant in the execution, *then had;* and this estate was wholly at an end, when the said Hanrihan died without issue. The judgment below must be affirmed.

PER CURIAM. Judgment affirmed.

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(514) JOHN NEWLIN *vs.* RICHARD FREEMAN & al.

1. The probate of a will of lands by a married woman, cannot be had in the County Court.
2. A married woman can only make an appointment in the nature of a will of real estate, under a power of appointment specially given in some deed, and that appointment the Courts of Equity have alone the jurisdiction to determine on and enforce.
3. But a married woman, by her husband's consent, can make a will of her personal property.
4. And where he has covenanted in a marriage settlement, that she may make such will, but withholds his consent from the particular will she makes, this is still her will as to personal property; sufficient, at least to repel his right of administering, and to authorize the granting of administration to her appointee, with the will annexed.
5. In case of appointments, authorising married women to make a will of personal property, the appointment must be proved as a will in the proper court, and then is regarded in all courts as a will.

The following is the case reported by the Judge below to the Supreme Court.

This was an issue *devisavit vel non*, tried at Orange Superior Court of Law, at Spring Term, 1841, before his Honor, Judge PEARSON, between John Newlin, who propounded the paper writing, as the last will and testament of Sarah Freeman, and

Richard Freeman and others, who entered a *caveat* thereto. It was admitted that Sarah Freeman, at the time of making the supposed will, and up to the time of her death, was the wife of Richard Freeman one of the caveators. It was also admitted, that marriage articles had been executed by them, before their intermarriage, by which, among other things, it was stipulated,

"that the said Sarah shall have, use, possess and enjoy
(515) all her property of a personal nature, consisting as well
of the negroes now in possession, as those which may hereafter come into existence of their increase, with her choses in action of every kind and description, free from any molestation or hindrance from him or any person claiming under him—and also the hire of the said negroes, and the accruing interest upon the said *choses in action*. And the said Richard Freeman doth further covenant and agree *that the said Sarah shall have full power and authority to dispose of during said coverture, the whole or any part or portion of said property, by deed or will.* And the said Richard Freeman doth further covenant and agree to, and with the said Sarah, to relinquish, and by these presents doth relinquish all right, which he may or might by the laws of the country possess, in case he survive the said Sarah, to succeed to her personal property as her next of kin." "And it is further agreed by the parties hereto, that the said Sarah shall have full power and authority, during coverture, and by her last will and testament, to dispose of her said lands to whomsoever she shall choose; and, in case of failure by said Sarah to make such disposition by her last will and testament, such land upon her death shall descend to her heirs." These articles were duly proved and recorded. The counsel for the caveators insisted that the said Sarah could not in law make a will, disposing of either real or personal property. It was thereupon agreed that this question should be reserved, and the issue submitted to the jury, free of this difficulty, and, if the jury found the issue in favor of the caveators, the verdict should be so entered; but if the jury found the issue in favor of John Newlin, the verdict should be subject to the question reserved, which should be presented by a case agreed. The plaintiff proved, by the two subscribing witnesses to the will, the formal execution thereof, that they signed the paper in her presence and at her request—that she signed in their presence and acknowledged the paper to be her will; and that she was then of sound mind. The said witnesses proved that Newlin requested them to go up to Freeman's—that Richard

Freeman, the husband, was absent—that neither witness
(516) read the paper or knew what it contained—that it was so folded down that they could not read its contents—they had known her a long time, but had no intimate acquaintance with her—and one of them was asked by her, a year or more before that, if he would witness her will and keep it secret—she enjoined secrecy on both at the execution.

The defendants then offered evidence to shew that the will was written at Newlin's—that no one was present at the time but Newlin and the witness, Mr. Jackson, who wrote the will—that Newlin dictated the whole of the will—that the witness who wrote the will, had received no instructions from Mrs. Freeman for the writing of a will, or this one in particular, nor after the will was written did he ever speak to Mrs. Freeman, nor she to him on the subject of her will. The defendants further offered evidence, shewing that Sarah Freeman could not read English, nor write the language—that she was a German woman, and could read German—that she was ignorant—and, one witness, Dr. James Webb, said, would be easily imposed on by one in whom she had confidence—that she was 65 or 70 years of age—that she and her husband, Richard Freeman, lived together on terms of affection—that she had declared, before making the will and afterwards, that, when she was dead, her negroes should be free, and serve no one.

The plaintiff then introduced two other wills, written by Newlin for the supposed testatrix, previous to her marriage with Freeman and during her widowhood, devising and bequeathing her whole estate to Newlin, and proved, further, that she had great pecuniary confidence in Newlin, and entrusted him with the management of all her funds. The subscribing witnesses to the wills introduced had never heard them read nor knew what they contained. Newlin was a member of the Quaker Society. Mrs. Freeman had always said that it was the intention of her former husband and herself to set the negroes free, and send them to a free State or country—that she could not do that, and she intended to give them to some steady old Quaker, who would not own slaves, and that both she and her first husband
(517) had repeatedly declared that their relations never should have their property—she was of a fixed and decisive character—she was never heard by these witnesses to speak of her disposing of her property after she married Freeman.

The defendants then proved by Freeman and Crawford, that she had said she intended to give a part of her land to one of

the sons of Richard Freeman, her husband, and another part to a young man named Crawford, whom she had raised, and the personal property, with the exception of her slaves, to her husband—that her slaves should not belong to any one, but go free.

His Honor charged the jury, in substance, that if the execution of the will was obtained by undue influence, by fraud or imposition, they would find in favor of the defendants—that what amounted to such fraud, undue influence or imposition, as would be sufficient to set aside a will, were questions of law for the court, and the court then explained these terms to the jury—that whether such fraud, influence or imposition had been made out were questions of fact for the jury—that it was not necessary to have direct proof, but it was sufficient if, from the evidence, the suggestions and arguments of counsel, and their own sense and observation and knowledge of human nature, the jury were satisfied as reasonable men, that the paper writing had been obtained by undue influence, fraud or imposition—that after the formal requisites of a will had been proved, it was then for the caveators to make out undue influence, fraud or imposition—that the existence of these facts, like every other fact, must be proven, either directly or by such circumstances as satisfy the jury of their existence. The jury found, upon the issue submitted to them, that the paper writing was the last will and testament of Sarah Freeman, dec'd.

The defendants' counsel then moved for a new trial, alleging errors in the instructions of the Judge, upon the questions of fraud, undue influence and imposition; for, although they admitted the definitions of those terms by the court were satisfactory, his Honor ought to have instructed the jury, that if they believed from the evidence, that under the circumstances of the case a fraud was easily practicable, they might say
(518) they were not satisfied one was not practiced, and thence infer its existence unless the contrary be clearly shown—that it was in the power of the jury and it might, as reasonable men, be their duty, for fear of fraudulent practices and in prevention of them, to find a fraud or give a verdict, such as they would, if they had found a fraud, where there is a defect of proof to negative it—that his Honor did not inform the jury of the full extent of their power over the paper writing offered as a will, for, as they insisted, in wills the jury had more liberty to infer fraud than in other cases. His Honor refused to grant the motion for a new trial.

The question reserved was then presented by this case agreed.

Some short time before their intermarriage, the said Richard and Sarah executed under their hands and seals articles of marriage agreement, the contents of which, so far as they regard this case, have been already stated. Afterwards in 1835, the said Sarah, being then under coverture, executed the paper writing found by the jury to be her last will and testament, which purports to dispose of both real and personal estate, which estate, as well the personal as the real property, is the property reserved to her by the articles of agreement — that at the time the said Sarah executed the said paper writing the said Richard, her husband, had no privity or knowledge of the same, and that the existence of the said paper writing did not come to his knowledge until in the year 1839, a few days after her death, when the said Richard objected to the same and continued his objecting up to the time it was offered for probate, when he and the others, the heirs at law of the said Sarah, entered their caveat. Sarah Freeman never had a child.

As to the personal property, the court was of opinion that Richard Freeman, having given to the said Sarah the power to dispose of the personal estate, to which he would otherwise have been entitled by the marriage, was barred by the marriage articles; and that it was according to the course of the court to admit the paper writing to probate, as the foundation of further proceedings in equity. It was thereupon considered by the court that the paper writing be admitted to probate, as the
(519) last will and testament of Sarah Freeman, disposing of the personal estate therein mentioned, and that the same be so certified to the County Court.

As to the real property, the court was of opinion, that *femes coverts*, being excepted in the statute of Henry 8th, had no power to devise real estate, and that the heirs at law, not being parties, were of course not affected by the marriage articles. It was therefore considered that the paper writing, so far as it disposes of real estate, should not be admitted to probate as the last will and testament of Sarah Freeman, disposing of real estate therein mentioned, and that the same be so certified to the County Court.

With which judgment, as to the personal estate and the refusal of the motion for a new trial, the caveators being dissatisfied, prayed an appeal to the Supreme Court. From the other part of the judgment, the plaintiff appealed.

Waddell, for the plaintiff, cited the following authorities: 2 Chitt. Blac., 280, n. 3, 2; Ves., Sen'r, 191; 2 Eden., 239; 1

Bro. Par. Ca., 486; Ambler, 565; 2 Roper Hus. & Wife, 180; 4 Kent's Com., 505; 3 Ash., 160; 1 Ves., jr., 46.

Saunders contra.

GASTON, J. We are of opinion that none of the exceptions, urged by either of the parties to the judgment below, can be sustained, and that the law has been fairly expounded and correctly administered upon the trial.

The instrument upon which the issue was made up could not be found a will of lands, because the supposed testatrix was a married woman, and therefore in law incapable of devising lands. By the common law of England, after the conquest lands could not be devised, but the statute of Wills, 32, H. 8, ch. 1, explained, because of abundant caution, by Stat. 34, H. 8, ch. 5, enacted that all persons seized in fee simple (except *femes coverts*, infants, idiots, and persons of non-sane memory, might devise to any other person, except bodies corporate, two thirds of their land held in chivalry, and the whole of those holden in socage. This was the law brought over to this country by our ancestors, and, as all tenures here before the revolution were by free
(520) and common socage, this power of devising applied to all lands within the colony. Many laws have since the revolution been enacted by our Legislature on the subject of devises, but none extending or abridging the *power* of tenant in fee simple, such as it existed at the revolution. A married woman, neither in the country of our ancestors nor with us, ever had capacity to devise. It is true that she might by means of a power, properly created, appoint a disposition of her real estate after death, which power must be executed, like the will of a feme sole, and is subject very much to the same rules of construction. But the act, if good, is valid as an *appointment* under a power, and it is not a devise; for to hold it such would be to give to a married woman a capacity which she did not possess at common law and which no statute has conferred upon her. The question here submitted, so far as the lands of the testatrix were concerned, was not whether a valid appointment had been made, for *that* question could not thus be tried; but whether the paper writing produced was a good will. No finding of the jury in this case, nor adjudication thereon, can prevent the propounder of this will from setting up the disposition of the lands, contained in it, as an appointment in equity, should he think proper to bring it forward as such, before the proper tribunal, against the proper parties. When thus preferred, its validity as an appointment may be tried as such court shall direct, but not

until then. Very different, however, is the law on the subject of the disposition of personal estate to take effect after death, by what is properly called a *testament.* Whatever fluctuations in the law might have existed upon the subject of testaments at an early period, a general power to dispose of chattels by testament existed long before the statute of wills, in every part of England, except in the province of York, the principality of Wales, and the city of London, where by custom, if the testator had wife or children, the power was restricted to a part only of the testator's goods. The validity of a testament was by the law a question exclusively for the determination of the ecclesiastical tribunals, and these tribunals, in passing upon that question, were governed principally by rules drawn from the civil
(521) law. They held that a married woman, by her husband's license, might make a testament, and where he had covenanted on marriage to allow her that license, but withheld it from the particular will in question, it was still her testament, sufficient at least to repel him from the right of administering on her effects, as he was entitled to do in case of intestacy, and to authorise the granting of administration to her appointee *cum testamento annexo.* So exclusive is the jurisdiction of these courts over the subject matter of testaments, that when a power is secured to a married woman of making an appointment of personal estate by will, no court can give effect to an appointment under that power, until the writing purporting to contain the appointment has been first *proved* in the proper Ecclesiastical Court *as a will.* And when it has received this probate, and unless this probate be called in, all other courts are bound to regard the writing so proved as a will. (*Ross* v. *Ewer*, 3 Atk., 160; *Cothay* v. *Sydenham*, 2 Bro , 302; *Rich* v. *Cockell*, 9 Ves., 369; *Stevens* v. *Bagwell*, 15 Ves., 139; *Douglas* v. *Cooper*, 3; *Mylne* v. *Keene*, 378, 9th Con. Ch. Rep., 85.) Such is the law which obtained here upon the first colonization of this country. Instead of the Ecclesiastical Courts, other courts were invested with jurisdiction over testaments, but the change of *jurisdiction* left the *law* of testaments unaltered. Who can make a testament—what is a testament—the necessity and effect of probate of a testament—are all questions to be decided by that law, having regard to the modifications thereof, which may have been made by legislative enactments. We know of none such affecting the question now under consideration. See *Harvey* v. *Smith*, 1 Dev. & Bat. Rep., 186.

It has been urged as an objection to his Honor's instructions,

that therein he omitted to inform the jury, that, because of the facility with which a fraud might be practised upon a testator, under circumstances like to those shewn in the case before them, and because of the danger of such frauds being practised with impunity, unless a jury should infer fraud from the con-
(522) currence of many suspicious circumstances, and defect of evidence to repel the inference, they ought not to require absolute proof of fraud. But to this objection it is a conclusive answer, that no such special instruction appears to have been prayed upon the trial, and the want of it is first brought to notice upon the motion for a new trial, when it was urged as a reason in favor of such motion. But, moreover, it is not improper to add, that *this*, which is insisted on as a fit matter for a special instruction, is an argument proper to be addressed to the discretion of the jury as rational men, and not a principle of law to be given to them in charge. *Downey* v. *Murphey*, 1 Dev. & Bat., 82. It is to be presumed, that as an argument it was urged to the jury; and if so, it was not the duty of the Judge to repeat it. But if the fact be that the counsel failed to urge it, the province of the Judge was not to supply arguments for either party. His duty is fulfilled if he "state in a full and correct manner the facts given in evidence, and declare and explain the law arising thereon." Revised Stat., Ch. 31, Sec. 136. Nothing appears on the Record to warrant a belief or doubt even that this was not done.

The judgment must be affirmed. As both parties appealed from the judgment of the Superior Court, and that judgment is affirmed *in toto*, we do not adjudge costs in this court to either. If the Clerk's costs have not actually been paid, he may collect them by execution under the provisions of the 24th Section of the 105th Chapter of the Revised Statutes.

PER CURIAM. Judgment accordingly.

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(523) JOHN L. BETHEA, Adm'r of SUSANNAH ROBINSON, dec'd, *vs.* ALEXANDER McLENNON.

1. The proceedings on an inquisition of lunacy are not void, because no affidavit accompanied the petition to the court, nor because the alleged lunatic was not present at the time of taking the inquest, nor because the jury, in their inquisition, returned to the court, find that "he is lunatic and idiotic," they having also found that "he is of non-sane memory"—the former words to be rejected as surplusage.

2. It is generally proper that an affidavit should accompany the petition, but this is a matter for the discretion of the court, to whom the petition is addressed.

3. The alleged lunatic has a right to be present at the inquest; and if this right is denied him, it is a good cause for setting aside the inquisition.
4. But when an inquisition, taken by order of a court of competent jurisdiction, is returned to and confirmed by the court, it is to be respected, like other judgments of a court, until it be reversed or superseded.
5. In an action of detinue, the defendant may be permitted to plead, as a plea since the last continuance, the death of a slave named in the declaration; and in such a case, the jury should be instructed that, if such death has happened, while the slave was in the defendant's possession and without his fault, they should not include any part of the value of the slave in the estimate of damages; but if it has happened because of ill-treatment or culpable neglect, or, after a disposition of the slave by the defendant, they may include the value in such estimate.
6. Evidence ought not to be received of the alleged death, unless the matter be specially presented by a plea; and this plea may be received, if properly verified, at any moment before the verdict is rendered.
7. The jury, however, in such a case, should give damages for the detention of the slave, while living.
8. In trover the death of a slave converted does not affect the plaintiff's right to recover his value, because by the conversion the defendant made him his own.
9. No agreement of the parties can confer on the Supreme Court a jurisdiction to render any other judgment, than what in law appears to them ought to have been rendered in the Superior Court.
10. The case of *Skipper* v. *Hargrove*, Martin, 74, cited and disapproved.

This was an action of detinue for sundry slaves, tried at Fall Term, 1840, of Cumberland Superior Court of Law,
(524) before his Honor Judge SETTLE. It was proven that the slaves were once the property of the plaintiff's intestate, but the defendant claimed them under a deed, made by the said intestate to the defendant. It was insisted by the plaintiff, that, at the time of making the said deed, his intestate was *non compos mentis*. As a part of his proof, the plaintiff relied upon an inquest of lunacy, a copy of the proceeding on which was produced. To this the defendant objected, as being irregular and void. (The copy, so far as the objections apply to the proceedings, is hereto annexed.) The objections were overruled and the proceedings received by the court as *prima facie* evidence that the plaintiff's intestate was *non compos mentis* at the period of the said finding, and so continued, until the contrary should appear; but that it was only *prima facie* evidence at any period, and that the defendant was, notwithstanding, permitted to controvert the finding of the jury, in the inquest of lunacy, and to show that, at the time of this alleged conveyance, the plaintiff was of sound mind. And the jury was charged accordingly. The jury were further charged, that, if they believed the plaintiff's intestate *non compos mentis* at the time of

making the deed, the plaintiff was entitled to recover. On this point, his Honor adopted the definition of lunacy, idiotcy and *non compos mentis*, as laid down in the authorities read by the defendant's counsel, but, in the process of illustration of what constituted the sane mind, the possession of which rendered a person competent to convey his property or make a contract, he made use of these words: "it was such an one as was capable of making a discreet and prudent disposition of his or her property," but said also that no weakness of mind, short of lunacy, idiotcy or *non compos mentis*, was sufficient to render invalid the acts of the plaintiff's intestate, if no fraud existed in the *factum* of the execution, for that the law did not measure the size of men's intellects; and, although a man might be dull or stupid, yet, if he was not of an insane mind or *non compos mentis*, his acts were valid. A verdict was rendered for the plaintiff under the charge, and a rule for a new trial for the admission
(525) of improper testimony and misdirection being overruled and judgment rendered for the plaintiff, the defendant appealed to the Supreme Court.

And if the Supreme Court should refuse the defendant a new trial and should affirm the judgment of the court below, it is agreed by the parties, that, as to the slave Lewis, who died during the term and pending the trial, this matter should be considered as pleaded *puis darrein continuance*, or in such other form as would have rendered the fact of the death of the said Lewis available to the defendant. And it is further agreed that the court, as to that part of the case, may render such judgment, as ought to be rendered, were the point properly presented and the action brought for that slave alone. But this agreement is not to affect or in any way interfere with the plaintiff's verdict and judgment, so far as regards the other slaves sued for in this action.

Copies of the record in the Inquisition of Lunacy.

To the Worshipful Justices of Cumberland County Court:

The petition of Lewis Robinson humbly shews, that his sister Susannah Robinson, an inhabitant of said county, is now about sixty years of age, and that from her infancy she has been subject to great bodily infirmity, caused by a stroke of the palsy, which paralyzed her right side; that from this cause and old age combined, she is now *non compos mentis* and incapable of managing her estate and business; that she has property, consisting of lands and negroes, and from her imbecility of understanding

is wasting and destroying her property. Your petitioner therefore prays that a jury may be ordered to ascertain whether she is *compos mentis*, or capable of managing her affairs and estate.

HENRY for pet'r.

An order was thereupon directed to the sheriff, requiring him to summon a jury to make inquisition, &c.

The following is the return of the jury:

Persuant to an order of the Court of Pleas and Quarter Sessions for Cumberland County, ordering the sheriff of said county, to summon a jury of good and lawful men, to enquire into the lunatic and insane condition of the mind of
(526) Miss Susannah Robinson, we, the undersigned, after being summoned and duly sworn, and from the testimony made in the case, we certify that she, the said Susannah Robinson, is lunatic, idiotic, of an insane mind, and altogether incapable of managing her affairs; that she has been in that situation from her infancy, but that the imbecility of her understanding has been increasing and more apparent for the last two years. We also ascertained that she, the said Susannah, has in her possession, as owner, about 500 acres of land situated on Cape Fear in Cumberland County, and five negroes, stock and household furniture.

In testimony whereof, &c.

Signed by the Jurors.

This report of the jury was returned and confirmed by the court, and a guardian adopted.

No counsel for plaintiff.

Strange for defendant.

GASTON, J. In support of the exception taken at the trial to the admission in evidence of the inquisition of Lunacy, it has been insisted, in the first place, that the proceeding, wherein it was had, was so irregularly conducted, as to render such inquisition void. The alleged irregularities are, that the writ issued without a previous affidavit, and that it does not appear that the alleged Lunatic was present before the inquest, or was notified to attend the inquest, when taking the inquisition.

Considering the inconvenience and distress, which may result from the issuing of a commission of Lunacy unnecessarily, it is a very proper caution to require, as preliminary thereto, an affidavit evidencing insanity and showing a fit ground for such a proceeding. It is manifest, however, that this is a matter of dis-

cretion, entirely under the control of the court, which has the general power, whenever it should think proper, to cause such writs to issue. It is true, that the Lunatic is entitled to be present before the jury; and if they deny him this right, such denial would be a sufficient cause for setting aside the inquisi-
(527) tion. But it cannot be that these alleged irregularities will so entirely avoid the inquisition, that all persons may treat it as *ipso facto* null. The court had jurisdiction to issue the writ, the jury had authority to make the inquiry, and their inquisition, returned and confirmed by the court, must be regarded with the respect due to such solemn proceedings, until it be reversed or superseded, It was further insisted that the inquisition is vague, defective and repugnant—vague and defective because the jury do not, in direct terms, "say that the said Susannah is *non compos*," and repugnant in this, that the jury certify she is lunatic and idiotic. We do not feel the force of these objections. By the writ, the jury are to enquire upon their oaths, and return to the court the result of that enquiry, as to the insanity of the alleged lunatic. When upon their oaths, and under their seals, they *certify* that she is *non compos*, unquestionably they so say, and when they declare that they so say because of the evidence before them, it is an expression of that which would have been implied, had they made no reference to the evidence. Whatever they say ought to be in pursuance of the conviction produced by the testimony. Nor do we admit that the inquisition is repugnant. It contains many unnecessary phrases and epithets used not in a technical, but in the ordinary sense. It states that she is lunatic and idiotic, not that she is a lunatic and an idiot. They further say that she is incapable of managing her affairs. *All* these may be rejected as superfluous and redundant, and then there remains the technical and precise finding that she is of an "insane mind." This is enough to support the inquisition.

The exception taken to the charge of the Judge, is in our opinion, unfounded. Whatever weight might be due to the criticism made upon a part of his Honor's illustration of soundness of mind, viz. "that it is such as renders one capable of making a discreet and prudent disposition of his property," if this part were detached from the context and regarded as laying down the criterion, by which to discriminate between legal sanity and insanity, we have no right, nor is it consistent with fairness, thus to consider it. The case states this as part only of an illustra-

tion and sets forth that his Honor did give the jury
(528) correct information of what in law constituted unsoundness of mind, and specially instructed them, that no weakness of intellect short of this legal unsoundness would avail to set aside the deed of Susannah Robinson to the defendant.

A question is made for our consideration, which is of much general interest, and upon which the counsel on both sides have earnestly pressed for our decision. It is not presented in the regular mode, and in strictness we might excuse ourselves from noticing it. But we have considered it with much attention, and we will not decline from declaring the result to which that consideration has conducted us. The case, so far as it makes this question, is as follows: "If the Supreme Court should refuse the defendant a new trial and should affirm the judgment of the court below, it is agreed by the parties that as to the slave Lewis, who died during the term and pending the trial, the matter should be considered as pleaded *puis darrein continuance*, or in such other form as would have rendered available to the defendant the fact of the death of said Lewis; and it is further agreed that the court, as to that part of the case, should render such judgment as ought to be rendered, were the point properly presented and the action had been brought for that slave alone. But this agreement is not to affect or in any manner interfere with the plaintiff's verdict and judgment, so far as regards the other slaves sued for in this action."

Now it must be distinctly understood that no agreement of the parties can confer upon us a jurisdiction to render any other judgment than what in law appears to us ought to have been rendered in the Superior Court. Be our opinion therefore what it may upon the question thus presented, the judgment of this court must be that the judgment of the court below be affirmed, because in that judgment we see no error. It will be for the parties, after the rendition of this judgment, to make their own arrangements for carrying into effect the spirit of their agreement.

We hold it to be clear that the death or destruction of any specific thing, the subject of an action of detinue, occurring after
the action brought, cannot avail to *defeat* the action of
(529) the plaintiff. Detinue is a mixed action, brought to recover specific goods or the value thereof, if they cannot be had, and also damages for the detention. The plaintiff may destroy his action by his own act, as by taking the goods after suit brought—because thereby he falsifies his own writ. So if the party after suit brought, were to release the specific

goods to the defendant, he would by this his act release the entire action. "There is a diversity," says Lord Coke, "between the act of a party and an act in law; for a man by his own act cannot alter the nature of his action, and therefore if lessee for life or years do waste, now is an action of waste given to the lessor wherein he shall recover *two things*—viz. the place wasted and treble damages. In this case, if the lessor release all actions real, he shall not have an action of waste in the personalty only; and if he release all actions personal, he shall not have an action of waste in the realty only. And so it is, if the lessee doth waste, and after surrendereth to the lessor his estate and the lessor accept thereof, the lessor shall not have an action of waste. But by act in law the nature of the action may be changed, as if a man make a lease *pour terme d'auter vie*, and the lessor doth waste and then *cestuy que vie* dieth, an action of waste shall lie for damages only because the other is determined by act in law." Co. Lit., 285 a. The termination of the plaintiff's interest in the goods, which in law necessarily follows when the goods cease to be, not having been caused by his own act, may change the nature of the plaintiff's action, so far as it demands the restitution of the goods themselves, but it does not impair his claim for damages, because of the unlawful detention thereof. When an action is exclusively personal or exclusively real, and is for one entire thing, no plea can be good which does not altogether bar the action. But when the action is of a mixed nature, demanding a specific thing and damages also, pleas may be good, which defeat the action in part only. Thus in an action of dower, the tenant cannot plead a prior term of years *in bar* to the action, but he may plead it in delay of execution, and to save himself from damages. (See Roscoe on real actions, 223, and authorities there quoted.) So in a writ of dower *unde nil habet*,
(530) the plea of *tauts temps pret* may be pleaded in bar of the damages, because the heir, who is tenant, holds by title, and is guilty of no wrong until a demand be made; and upon such a plea the demandant is entitled to judgment of seizure of the land immediately, because as to that the action is undefended. Ditto, 213. So in a *quare impedit* the patron may plead *ne disturba pas*, if in fact no disturbance took place; and upon this plea the plaintiff may either pray judgment and a writ to the Bishop, or may maintain the disturbance and proceed for his damages. Ditto, 233. *Colt* v. *Bishop of Cor.*, Hob., 162; *Rex* v. *Bishop of Worchester*, Vaughan, 58. Upon a plea in *Warrantia Chartæ* the defendant may admit the obligation to

warrant and plead in bar to the damages, that the plaintiff has not yet been impleaded, in which case the plaintiff is entitled immediately to judgment to recover his warranty, but not his damages. Fitz. N. B., 134 k. *Roll* v. *Osborn*, Hob., 23. So if an *ejectione firmæ* be brought and the term runneth out pending the action, yet the action shall proceed for damages. Co. Lit., 285 a. In actions like these, the judgments, as to the specific thing demanded and the damages, are so far several, that the judgment for the one may be affirmed in a writ of error, and that for the other reversed. Har., note 4 to Co. Lit., 32, (b.)

We see no sufficient reason why the death or destruction of the goods demanded may not be pleaded to so much of the action as demands the goods, if in law such destruction is an answer to that claim.

Upon principle, it seems to us that a destruction by the act of God is in Law an answer thereto. The action of Detinue affirms a continuing property in the plaintiff in the goods demanded, and alleges the wrong to consist in withholding from the plaintiff the possession thereof. When the goods cease to be, the property of the plaintiff therein ceases. He has no right to their possession; and upon this appearing the law would be absurd in awarding, that therefore the plaintiff do recover the said goods, or the said sum for the value thereof if they may not be had.

(531) The act of God does injury to no man. When a thing ceases to be, because of a dispensation of Providence, there may be loss, but there is no injury; and this loss falls upon the owner of the property. We know of no instance where the law interferes to throw the loss from him upon others, where it is not attributable to culpable act or neglect. Then it is not a mere loss, but an *injury;* and the wrong doer is justly answerable for it.

There is a marked distinction between the action of detinue and that of trover, though, in many cases, it is at the option of the plaintiff to bring which he will. The former asserts a continuing property in the plaintiff, and alleges the wrong to consist wholly in the withholding of the possession of his goods from him by his bailee; while the latter affirms that although they were once the proper goods of the plaintiff, they have been made the goods of the defendant, and complains of the injury caused by this conversion. If, after being thus converted, the goods perish by unavoidable accident, the loss falls upon the defendant, who has made them *his;* and this misfortune shall not exonerate him from answering for the wrongful conversion. If not con-

verted, but remaining in the hands of a bailee, they there perish, the loss is the misfortune of the owner, and the bailee is answerable for the wrong detention.

In asserting the value of the goods, in an action of detinue, the jury is to find the present value. This is manifest from the form of the writ of enquiry, which issues where there has been a judgment for the plaintiff on *non sum informatus*, *nil dicit*, or demurrer—from the form of the verdict, where the jury find the value on the trial of an issue, and from the terms of the final judgment. It is required, too, by obvious reasons of propriety. Great alterations of value may happen in the value of the things demanded, pending the action; and the object of the action (so far as regards the things themselves) is to regain them, such as they are, or, if that may not be done, *then* their value. If, in the course of a tedious action, a puny slave child has grown up to vigorous manhood, it would be a poor substitute for the slave himself to give the value of what he was, when the action was instituted. If, on the contrary, a vigorous, healthy slave (532) has been rendered valueless by sickness and decrepitude, it would be unconscientious to set upon him more than a nominal value. How ought the slave to be valued that is no more? If he were on the brink of the grave at the time of the trial, the jury would discharge their duty by valuing him at five cents; but if it is shewn that, before the trial, he had fallen into the grave, is he to be paid for as of full health and vigor? Is there not an absurdity in affixing any value to what is judicially ascertained not to exist?

Certainly when a man detains, without just cause, the goods of another, he ought to be answerable to the full extent of the injury thereby inflicted. And so he is rendered through a judgment of damages for the wrong, if the wrong be one of detention merely. But if the injury is not only a wrong of detention, but of conversion, let him then pay also the value of the property converted. Where the owner, *by reason of such detention*, has been deprived finally of the thing detained, as by voluntary destruction, or through culpable negligence of the bailee, it is not very material in what *form* the plaintiff gets his recompense; but he is not wholly compensated, unless he obtains both its use while detained and its value. But when such *injury* has not been inflicted, he is compensated by being paid for the wrong of which alone he can complain. It is not undeserving of consideration, also, that in many cases actions of detinue are brought to try some of the most difficult questions of title to slaves, and

when both parties are equally conscientious in asserting a claim thereto. If, in all cases, the holder is not only to be liable, in the event of failure, for hire, while they are in his possession, but also to be insurer of their lives, we drive him to the often inhuman alternative of making the most of them by sale, instead of keeping them to abide the fair result of the contest. In this case, it would be manifestly unjust, because of a mere mistake of title, to make him responsible for an act of Providence, which no prudence could avert, and which would probably have occurred had the possession been with his adversary. It is enough that using the property humanely and prudently, he account for the use of it, while in his possession, and deliver it up, if it exist, when the controversy is decided against him. It would
(533) have been a great relief to us could we have found any authorities in point, to guide us in this enquiry. But it is extraordinary how little is to be found in the law books bearing directly upon this subject. The action of detinue, by reason that wager of law was permitted in it, has almost become obsolete in England—though very recently there are indications of a disposition to revive it.

The following passage, which we extract from Roll's Abridgment, Title Detinue E., pl. 33, 407, and is also to be found in Brook's Abridgment Title Det., Pl. 25, throws some, though faint, light upon it: "In detinue of charters, if the issue be upon the detinue and it be found that the defendant hath burned the charters, the judgment shall not be to recover the charters, for it appears that he cannot have them, but he shall recover the value of the land in *damages*." So also in Jenkins Cent., 288, Case 22, who cites 22 Hen. 6, ch. 55, and saith, "that the judgment in detinue is for the thing detained and damages for the detention; but if the thing cannot be had by reason of the defendant's default, the inquest is to inquire and assess the damages, and the judgment is to be for the value and detention thereof." It is admitted that these summary statements made from the year books, are meagre and unsatisfactory; and we have been disappointed in the efforts we have made to obtain access to the year books themselves. But, meagre as they are, they favor the opinion, that when such destruction has not proceeded from defendant's fault, the defendant shall not answer for the value.

In our State, there has been no adjudication upon the point to our knowledge, unless it be one of which there is a short note in Martin's cases, page 74. The decision purports to have been made in Fayetteville. How the reporter (who certainly was

not present thereat,) obtained his information of the case is not stated, and on *what ground* the judgment itself rested, the report is entirely silent. It may have been because it was not stated in the case that the slave died by the act of God, or because the court thought the matter could not be found on the plea of non-detinet. Little reliance can be placed on it as authority.

In the State of Virginia the question occurred, and was
(534) discussed in *Austin's Ex'rs* v. *Jones*, Gilmer's Virg. Reps., 341. The jury in an action of detinue for several slaves, on the plea of non-detinet, found the issue as to all the slaves for the plaintiffs, and assessed their values severally, but they further found that Beck, one of the slaves so detained and so valued, had died pending the action. The court gave judgment for the other slaves, but rendered no judgment for Beck or her value. A writ of error was sued out by the plaintiff, and the cause removed to the Supreme Court, where it was argued before three Judges. On the main question, whether the plaintiffs ought to have had judgment for the value of Beck, Judge COULTER and Judge BROOKS differed, the former holding the negative, and the latter the affirmative. Judge ROANE concurred with Judge BROOKS in reversing the judgment, but upon the narrow ground that the finding of the death of Beck was to be rejected as surplusage, because that fact had not been put in issue; distinctly declaring that his opinion did not extend to cases, in which the subsequent death of the negro was relied on by plea *puis darrein continuance*, or otherwise, so that the plaintiff had an opportunity to contest the point upon the evidence. We have seen references to decisions in Kentucky, apparently bearing upon or connected with the question, but we have not been able to obtain correct reports of them.

After much consideration, our opinion is, that the defendant may be permitted to plead in an action of detinue, as a plea since the last continuance, the death of a slave named in the declaration; and upon such plea being found true, there is to be no assessment of the value of said slave in the verdict, and the plaintiff shall have judgment for damages only because of the detention; that when such death has happened while the slave was in the defendant's possession, and without his fault, the jury should be instructed not to include any part of the value of the slave in the estimate of damages; but if it has happened because of ill-treatment, or culpable neglect, or after a disposition of the slave by the defendant, that they be instructed that they may include the value in such estimate; and it is further our opinion,

that to prevent surprise, evidence ought not to be received
(535) of the alleged death, unless the matter be specially pleaded as aforesaid. The plea may be received, if properly verified, at any moment before the verdict is rendered. 1 Chitty's Plea., 698.

But notwithstanding opinion, which we entertain on this question, for the reasons heretofore mentioned, the judgment of the Superior Court must be affirmed with costs.

PER CURIAM. Judgment affirmed.

JOHN A. WILLIAMS *vs.* JOSEPH BUCHANAN.

1. A grant of land, bounded in terms by a river or creek, *not navigable*, carries the land to the grantee *usque ad filum aquæ*, to the middle or thread of the stream.
2. Where two grants or deeds *lap*, and neither party has the *actual* possession of the *lapped* part, the law adjudges the possession of that part in him, who has the better title; but if either be *actually* in possession of the *lapped* part, the law adjudges him to be in the exclusive possession thereof.
3. Possession of land is denoted by the exercise of acts of dominion over it, in making the ordinary use and taking the ordinary profits, of which it is susceptible in its present state—such acts to be so repeated as to shew that they are done in the character of owner, and not of an occasional trespasser.
4. In a stream not navigable, keeping up fish traps therein, erecting and repairing dams across it, and using it every year, during the entire fishing season, for the purpose of catching fish, constitute an unequivocal possession thereof.
5. The cases of *Wilson* v. *Forbes*, 2 Dev., 30; *Ingram* v. *Threadgill*, 3 Dev., 59; and *Pugh* v. *Wheeler*, 2 Dev. & Bat., 50, cited and approved.

This was an action of trespass *quare clausum fregit*, tried at Spring Term, 1841, of Chatham Superior Court, before his Honor Judge PEARSON. The trespass alleged was,
(536) putting a fish trap in Deep River, and joining the dam to a small island. It was admitted that Deep River was not a navigable stream. The plaintiff read a grant to one Stokes, which, it was admitted, covered the *locus in quo*, and that the fish trap and the island to which the dam was joined, consisting of a ledge of rock and a collection of trees and shrubs, were situate on the south side of a line, pursuing the river—the traps being across a sluice of water, running between the south bank and the island; and it was also admitted that, about the year 1816, the land on the north side of the river, and the land on the south side of the river, opposite the *locus in quo*, and the land contained in the grant to Stokes, by a regular chain of title,

became the property of one Ramsay; that Ramsay died about 1820, when, under regular proceedings had in the County Court, one Alston sold a part of the land to William Boylan, including the land on the north side of the river and a part of the land to Mrs. Ramsay, as described in the deed from said Alston to Mrs. Ramsay, of a subsequent date. Boylan sold to the plaintiff, and conveyed by the same boundaries as in the deed from Alston to him. Mrs. Ramsay, in 1829, conveyed to the defendant by a deed having the same boundaries as the deed from Alston to her. The plaintiff proved that in 1839, a short time before the writ issued, the defendant put in a fish trap and run a dam partly across the sluice to the island, which was the trespass complained of. The defendant proved that, soon after Mrs. Ramsay bought the land, she rented it to one Wicker for seven years, together with the privilege of fishing in the river—that Wicker took possession of the plantation, and in the spring of 1823, repaired an old trap at the *locus in quo*, put in a new trap near the old one, connected the two by a dam, and run a dam to the south bank, and one to the island, so as to reach entirely across the sluice, and continued to use these two traps in fishing seasons regularly up to the expiration of his lease in 1829. The defendant also proved that as soon as Wicker left the premises, he took possession, and continued to use the traps in fishing season every year—that the new trap, which he put in, was in Wicker's dam near the south bank, and that the new dam,
(537) made by him from one of the old traps to the island, went in a straight direction, and struck the island some fifteen or twenty feet lower down. The plaintiff insisted that the defendant's title did not include the *locus in quo*, and that he might recover for the alleged trespass. The defendant insisted, 1st, that his title did include the *locus in quo*, and that, supposing his title to be junior, it had become the better title by seven years adverse possession; 2d, that if his title did not include the *locus in quo*, the plaintiff's action for his original entry was barred by the statute of limitations, and that as he had all along held possession of the two old traps, the plaintiff had not such a possession as would enable him to recover, for putting in the new traps and making the new dam, which he contended amounted only to repairing the old one, was a mere continuation of his former possession; 3dly, that the plaintiff's title did not include the *locus in quo*.

The court was of opinion and charged the jury, that, from the evidence, the deed from Alston to Boylan, under which the

plaintiff claimed, included the *locus in quo;* that from the evidence, the deed from Alston to Mrs. Ramsay, under which the defendant claimed, also included the *locus in quo*—that when a deed commenced at the river, &c., then "up the river to the beginning," the river not being navigable, the proper construction made the middle of the river the line—that a reference in the deed to Boylan, contained in the deed to Mrs. Ramsay, being a special reference to a half acre did not alter the construction as contended for by the plaintiff's counsel—nor did the fact that Alston had, two months before, made a deed to Boylan, including the bed of the river, alter the construction, there being no call for Boylan's line up the river—that, according to this construction, there was a case of *lapped* land, and the rule in such cases was, that when the party, claiming under the junior title was in the actual possession of a part of the *lap*, and the party claiming under the senior title, although in the actual possession of the land outside of the *lap*, yet had no actual possession within the *lap*, possession of the party under the junior title, so having possession of a part within the *lap*, if continued
(538) without interruption for more than seven years, would ripen his into the better title—that in the present case, if the *lapped* land consisted of small islands unfit for cultivation, rocks and the sluice of waters, and the defendant had kept up his possession by means of the fish traps and dams, as described, using them for the purpose of catching fish in all the fishing seasons, that was such a possession, as, if continued for more than seven years, would ripen the defendant's junior title, so as to give him the better title; that being the only way in which possession would be enjoyed on this sort of land made use of. The court, having decided that the defendant's title did include the *locus in quo*, gave no instructions as to the second question, supposing his title did not include it.

There was a verdict for the defendant. A motion for a new trial was made, which was overruled, and then a judgment was rendered for the plaintiff, from which the defendant appealed.

Waddell for the plaintiff.
W. H. Haywood, Jr., for the defendant.

GASTON, J. The trespass, of which the plaintiff complained, was the putting of a fish trap in a sluice of Deep River, and the erection of a dam contiguous to the trap and extending from the south bank of the river to a rock on the north side of the sluice. The river was not navigable, and the rock and sluice were on

the south side of the middle or channel of the river. Both plaintiff and defendant set up title to the *locus in quo*, under conveyances from the same proprietor. The first conveyance was made to Boylan, under whom the plaintiff claimed, and it covered a tract of land on the north side of the river, the bed of the river where the alleged trespass was committed, (in express terms,) and also a half an acre of land on the south side of the river. The conveyance to Mrs. Ramsay, under which the defendant claimed, was for a tract of land on the south side of the river, which was described as beginning at a tree on the river bank above the *locus in quo*, running south therefrom, and,
(539) after various courses north, to the river, below the place where the alleged trespass was committed, then up the river to the first station, excepting thereout the half acre previously conveyed to Boylan. For sixteen years in succession after this conveyance to Mrs. Ramsay, those claiming under her had every year erected or repaired and used fish traps in this sluice, and kept up dams across it at and near this spot, for the purpose of catching fish, while no actual occupation on the part of the plaintiff, or those under whom he claimed, was shewn during that time, of the sluice, rocks, shoals or bed of the river between the channel and the south bank of the river. The half acre on the south side was indeed used by them as a ferry landing, but this half acre did not include the *locus in quo*.

Upon these facts his Honor charged the jury that the place where the trespass was committed was included within both the conveyances—that the conveyance to Boylan being the elder, it passed the title to the plaintiff—that a possession for seven years under the conveyance to Mrs. Ramsay would extinguish the elder title and give a title to the defendant—and that the continued acts of keeping up fish traps and dams, if the place could not, in its natural state, be cultivated, did amount to an actual possession thereof. Under these instructions, the jury found a verdict for the defendant, and a judgment being rendered accordingly, the plaintiff appealed.

With every part of the instructions we are entirely satisfied. There cannot be stated a better settled rule of the common law than that a grant of land, bounded in terms by a river or creek *not navigable*, carries the land to the grantee *usque an filum aquæ*, to the middle or thread of the stream. This rule of law has been recognised in every State of the Union, with whose judicial decisions we are acquainted. In some of the States, the common law criterion for distinguishing between rivers navigable and

rivers not navigable, whether the tide ebbs and flows therein or not, has been rejected as unsuited to their geographical condition; but in all, we believe, the construction of a grant coterminous with a river, held to be not navigable, is uniform—that in law it covers the bed of the river to the thread
(540) or middle of the stream. Certainly this has been regarded as undoubted law in our State. *Wilson* v. *Forbes*, 2 Dev., 30; *Ingram* v. *Threadgill*, 3 Do., 59; *Pugh* v. *Wheeler*, 2 Dev. & Bat., 50. The deed, therefore, to Mrs. Ramsay included the bed of the river on the south side of the main stream.

The exception in the deed of the half acre on the south side of the river, previously conveyed to Boylan, does not affect the *construction* of the deed. This half acre is, by the exception, simply taken out of the land included within the description; and being so taken out, all the residue of the land, coming within the legal effect of that description, is conveyed by the deed. The description is *single*. It makes no reference to the boundaries of the interfering tract conveyed to Boylan.

The case, then, is one of a senior and junior deed interfering in part with each other—or, in common parlance, lapping upon each other. The law in that case is undoubtedly as his Honor stated it—that if neither of the parties, contending under these deeds, has had an actual *pedis positio* on the part comprised within both deeds, but each grantee is settled on that part which is claimed only by himself, the law adjudges the possession of the lap, or part included within both deeds, in him who has the elder deed or better right—but if either be actually settled on the part included within both deeds, the law adjudges him to be in the exclusive possession thereof. Possession of land is denoted by the exercise of acts of dominion over it, in making the ordinary use, and taking the ordinary profits, of which it is susceptible in its present state—such acts to be so repeated, as to shew that they are done in the character of owner, and not of an occasional trespasser. We agree with his Honor in holding that the acts of dominion, continuously exercised over this sluice by keeping up fish traps therein, erecting and repairing dams across it, and using it every year during the entire fishing season for the purpose of catching fish, did constitute an unequivocal possession thereof. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

(541) JOHN COLE & WIFE & OTHERS *vs.* PENTICOST · ROBINSON'S Ex'rs.

1. An action of trover will not lie by one, who is entitled to a remainder in slaves after the expiration of a life estate against another remainderman, who, during the continuance of the life estate, which he had purchased, removed the slaves to parts unknown, so that they could not be found.
2. But, the estate in remainder being a legal estate, a special action on the case may be maintained to redress such injury.
3. The case of *Lewis* v. *Mobley*, 6 Dev. & Bat., 233, cited and approved.

This was an action on the case, tried before his Honor Judge DICK, at the Spring Term, 1838, of Richmond Superior Court of Law. A verdict and judgment having been rendered for the plaintiff, the defendant appealed to the Supreme Court. All the material facts of the case are stated in the opinion of this court.

Winston and *Mendenhall* for the plaintiff.
Strange for the defendant.

GASTON, J. There are three counts in the declaration of the plaintiffs. In the first, the plaintiffs charge that the defendant was possessed of two negro slaves of an estate during the life of Joanna Sergener, the remainder of the estate in said slaves belonging to the plaintiffs; and that the defendant, while so possessed, with intent to injure, prejudice and aggrieve the plaintiffs in their said interest in remainder, removed the slaves beyond the State to parts unknown to the plaintiffs, and absolutely sold and converted them to his own use, whereby the said plaintiffs, after the death of the said Joanna, have been utterly unable to find the said slaves, and have wholly lost the benefit of their interest in remainder therein. The second count charges that the defendant was in possession of two slaves of an estate for the life of Joanna Sergener, the remainder of the (542) estate in said slaves belonging to the plaintiffs and the defendant, as tenants in common, and that the defendant, while so possessed, with intent to injure and aggrieve the plaintiffs in such their interest in remainder, removed the slaves to parts unknown, and absolutely sold and converted them to his own use, whereby the plaintiffs have been unable, upon the death of the said Joanna, to find the said slaves, or to receive and enjoy their undivided shares in the said slaves and their labor, and have wholly lost the benefit of such their interest in the remainder therein. The third count is in trover, wherein the plaintiffs allege that they were possessed of two slaves, that they casually lost the same, that the same came to the defendant by

finding, and that he wrongfully converted them to his own use. Upon the general issue, the plaintiff shewed that Thomas Foxhall, by his last will, bequeathed a negro woman, Fan, and her increase to his daughter Joanna Sergener for life, and after her death to be equally divided between all her children; that Foxhall died in 1792, and, after his death, John Sergener, the husband of the legatee Joanna, took possession of Fan under the bequest; that John Sergener and his wife Joanna had a son, James Sergener, and several other children; that in November, 1803, John and James Sergener, for a valuable consideration, sold and conveyed Fan to Robinson, the original defendant; that after the said sale Fan had issue, the negroes Tamar and Daphne, mentioned in the declaration; that in 1829, Robinson sold Tamar and Daphne to a negro trader, who immediately removed them out of the State and to parts unknown; that in 1831, Joanna Sergener died; that shortly thereafter one of the plaintiffs in this action demanded the negroes Tamar and Daphne of Robinson, who refused to deliver them; and, on the 21st of March, 1832, this writ was sued out by the plaintiffs, who are all the children of the said Joanna, except James Sergener. Robinson died after the cause was put to issue, and the action was revived against his executor. Upon the case thus made, the defendant contended, 1st, that John Sergener had an absolute estate in Fan, as the husband of Joanna; 2dly, that the remainder to the children of the said Joanna was void; 3dly, that
(543) as Robinson purchased the negro Fan of James Sergener, he thereby became a tenant in common with the plaintiffs, and therefore the plaintiffs could not sustain an action of trover; and lastly, that as the sale by Robinson was in the lifetime of Joanna Sergener, there was no conversion of the negroes after the possessory right of the plaintiff accrued. The court instructed the jury, that the plaintiffs, under the will of Thomas Foxhall, had an estate in remainder, after the life estate of Joanna Sergener, in common with Robinson, who had acquired the share of James Sergener; that, as tenants in common with him, they might maintain an action against him, if there had been a destruction of the common property; that if Robinson sold and delivered the negroes to the negro trader, for the purpose of having them conveyed to parts unknown to the plaintiffs, and they were so removed, this was in law, as respected the plaintiffs, tantamount to a destruction of the property; and that, although the sale made by Robinson, was before the plaintiffs had a right to the possession of the slaves, yet, if made for the

purpose of preventing them from obtaining such possession at the death of Joanna Sergener, it was a conversion, which would sustain this action. The plaintiffs had a general verdict and judgment, and the defendant appealed.

We have no doubt of the correctness of the construction put by his Honor on the bequest in Mr. Foxhall's will. By will, and now by deed in cases of slaves, the law allows of a limitation to one for life, with a contingent remainder over to others at his death. The word "children" is an appropriate term to describe a class of persons bearing that relation, and by that term they may take as designated individuals. It is not a word of limitation, but simply of description or purchase. There may, indeed, be sufficient indications from the context of a will or other instrument, that the word "children" has been inaccurately used in it, and that thereby heirs or heirs of the body were intended. If there be, then the construction is to be put upon the mistaken term, which, it is thus shewn, it was designed to bear; and the instrument will have the same operation, as if the correct expression had been used. But nothing is here shewn to evince, that the testator, by the word "children," did not mean children in the ordinary and natural sense of the word; and there is, therefore, nothing to warrant the court in assigning to it any other sense.

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Since the trial of this cause in the court below, we have had occasion to consider and decide one of the points made in it. In *Lewis* v. *Mobley*, 4 Dev. & Bat., 233, this court held, that where the tenant for the life of another sold a slave, pending the life estate, the ultimate proprietor could not, because of that disposition, maintain trover; because, at the time of the alleged conversion, he had not in him a present right to the possession. We are bound, therefore, to hold, that there was error in this part of his Honor's instructions.

It has been pressed upon us with much zeal and ability, that the jury ought to have been instructed that the plaintiffs could not maintain any count in the declaration—not the third, because of the reason just assigned—not the first, because the evidence did not correspond with the allegation therein, that the plaintiff had the entire interest therein—and not the second, because the absolute sale of a slave, under any circumstances, by a tenant for life, is not such an injury to one in remainder as to be the foundation of a legal action. If we had been convinced by this argument, we should not have hesitated so to declare, although not necessary for the decision of the case before us, in order to

save the parties from incurring further expense in this action. But we are not so convinced. Notwithstanding many difficulties attending the form of such an action—as, for instance, when does the right of action accrue, and what is the proper measure of such an injury—we believe, that, as the remainder in slaves is a *legal* interest, there must be a *legal* remedy for a wrong purposely done to it.

Because of the error already noticed in the Judge's charge, there must be a new trial. It is apparent upon the case, that the trial was had *upon the count in trover*. The points made, and the instructions given, were all in relation *to that count*, and *non constat* what would have been the verdict
(545) of the jury, had their attention been confined to the second count.

PER CURIAM. Judgment reversed and new trial awarded.

ABRAHAM PARKER'S EXECUTRIX *vs.* HENRY GILLIAM AND OTHERS.

1. Where the owner of a vessel agreed to hire her to another, for a period and at a certain price, and stipulated at the same time that she should be "furnished with sufficient cables, anchors and other tackling;" and the vessel was lost before the expiration of that period, in consequence of a defect in one of her cables; it was *held* that the owner could not recover the hire for the whole period, under the special contract, although it appeared that the defect in the cable (an iron cable) could not have been discovered by the most attentive examination.
2. Such a stipulation means that the "cables, &c.," are *actually* sufficient and not merely that they are *apparently* so.
3. The case of *Backhouse* v. *Sneed*, 1 Mur., 173, cited and approved.

This was an action, on the case tried at Spring Term, 1840, of Hertford Superior Court of Law, before his Honor Judge PEARSON. The plaintiff declared, 1st, on a special contract; 2ly, for the use of the vessel, from the 20th of March, to the 8th of April, 1838, and for bacon and meal furnished to the defendant. As to the second count, the defendant admitted that he was bound to pay for the use of the vessel and for the bacon and meal. The controversy was as to the first count. The plaintiff proved that the defendants had agreed to give
(546) her testator at the rate of $95 per month during the fishing season, which continues about two months, for the use of the schooner Thomas H. Blount, to tend upon their fishery on the north side of Albemarle Sound. It also appeared in evidence that, in making the bargain, the defendants told the

plaintiff's testator that the fishery was in an exposed part of the sound, and it was necessary for a vessel to have good anchors and cables to hold on. The plaintiff's testator replied that his vessel was furnished with an excellent iron cable, which had held her two days in a storm, and, he believed, was sufficient to hold her until she foundered. Thereupon they agreed—the defendants to pay the price as above stated, and the plaintiff's testator to have the vessel at the defendants' fishery on the 20th March, 1838, properly manned and furnished with sufficient cable, anchors and other tackling. Accordingly the vessel was at the defendants' fishery at the time agreed on, manned by a captain and two hands, which number was admitted to be sufficient, and furnished with the iron cable spoken of, two anchors, a small cable and other tackling, and was engaged in the employment of the defendants until the 8th of April, when, being moored off the fishery, riding on both anchors, for the purpose of taking in a cargo of fish, the wind blowing tolerably hard from the south-west, but not so as to amount to a storm or even a severe gale, and the water not being too rough to stop the fishing operations; the captain, who had been ashore by the defendants' directions, telling fish into a boat to load with, and one of the hands being also on shore cutting fish at the defendants' fishery, went on board to get breakfast, when he discovered that the main cable, to wit, the iron one, had parted; he instantly went ashore and informed the defendants of it. They told him to go to a neighboring fishery to get a drag, to fish up his anchor. He did so, and returned in about half an hour. As he was coming back he discovered that the small cable had given way from the vessel's turning, and, in a short time, before any assistance could get to her, she was driven near the shore and grounded. During that day and the whole of the next, defendants, aided by the captain and his hands and the fishing hands and (547) others, endeavored to get her off, but without success. Whereupon, as she lay in the defendants' fishing ground, so as to prevent the hauling of the seine, they set fire to her and burnt her up. The witnesses agreed in saying that the iron cable was, to all appearance, a sufficient one: it was not worn nor rusted, but was in good order and bright. They supposed the accident had occurred by one of the links of the chain, in consequence of the vessel's plunging, being turned or "kinked," so far as to make the strain on the side of the link instead of lengthways. They also stated that seamen differed as to the merit of hemp and iron cables. Some preferred iron, because hemp would

cut out if the ground was rocky; others preferred hemp, because, although iron cables would not cut out on the bottom, yet being made of cast iron and the links being liable to be turned wrong by the motion of the vessel, what were considered the best of cables, that had stood out many a storm, would sometimes give way, in consequence of a rotten place or flaw in a link that happened to be turned, which flaw could not be discovered by a previous examination. One of the witnesses stated that he examined the broken link of this cable and discovered a considerable rotten place or flaw. The captain stated that, until the cable parted, he had believed it entirely sufficient—that he had used this cable for some time and thought it a first rate one—that it had stood out many gales, when the wind blew three times as hard as it did, when the cable parted—and particularly that it had stood for two days during a violent storm in December preceding.

The defendants' counsel insisted that as the plaintiff's testator had undertaken to furnish a sufficient cable, and the cable furnished did not prove to be sufficient, he was not entitled to recover—that his undertaking amounted to a warranty, and it made no difference, even supposing the defect to be unknown to the plaintiff and of such a character as could not have been detected by the strictest examination. The plaintiff's counsel contended that the undertaking did not amount to a warranty against all accidents and contingencies, and was substantially complied with, if the cable furnished was to all appear-
(548) ance sufficient, and the plaintiff had no reason to believe or suspect that it was sufficient.

The court charged that if a man hired a negro or rented a house for one year, and the negro died or run away, or the house was destroyed by fire or tempest, during the year, the owner was entitled to the price agreed on, unless the loss had occurred by his default or omission; that in this case the defendants alleged they had lost the use of the vessel by the default of the plaintiff in not furnishing a sufficient cable. This being a parol agreement, it was the duty of the jury to ascertain from the evidence the terms of the contract, and it was then the duty of the court to instruct the jury as to the import and legal effect of the words used. If the words were—the plaintiff agrees to have the vessel at the fishery at a given time, properly manned and furnished with sufficient cables, anchors and other tackling—the law would consider the words as used in their ordinary acceptation; and the undertaking would be substantially complied with, if this

cable, for there was no controversy as to the other items, at the time the vessel went into the defendants' employment, was sufficient, that is, if to all appearances in size, condition, &c., it was a cable that would be called and considered sufficient for the vessel, and there was no defect that an ordinary man could detect on examination; that the undertaking did not in law amount to a warranty, that the cable should prove sufficient under all circumstances—and the question was this, was the cable sufficient? If not, the defendants were entitled to a verdict; if it was, and the parting of the cable happened by reason of a link's being twisted, and the strain being thence on a place that was rotten or had a flaw, and the rotten place or flaw was a latent defect, incident to iron cables from the nature of the materials out of which they were made, not discernible by examination; and the plaintiff had no knowledge of this defect, but believed from previous trials that the cable was as good as it appeared to be, the plaintiff would be entitled to recover; or if the jury believed that the cable was sufficient and free of all defect, at the time it was furnished and went into the defendants' service, and that the parting of the cable must have happened by reason of the links that gave way having, while in the defendants' service,
(549) been strained or weakened by some accident, and that the injury could not be discovered by the examination of an ordinarily prudent man, before the parting took place, the plaintiff would still be entitled to a verdict.

There was no evidence, nor was it contended by the defendants that the captain had been guilty of neglect, in not properly examining the cable, and the court observed to the jury that, unless requested, he would not confuse the case by examining how far the defendants were justified, under the circumstances, by their right of fishing, in burning the vessel, or whether the captain and hands were under the control of the plaintiff's testator or the defendants.

There was a verdict for the plaintiff on the special contract for the price agreed on. A motion for a new trial for error in his charge was overruled, judgment rendered for the plaintiff, and the defendants appealed.

Iredell for the plaintiff.
Kinney and *A. Moore* for the defendants.

RUFFIN, C. J. There is to be a loss of the wages of the vessel for the period between the day of the wreck and the end of the fishing season; and the question is, on which of these parties

it ought to fall. That depends on the legal import and obligations of the stipulation of the plaintiff's testator. In the present state of the case, it is to be assumed, that his agreement was to let the vessel to the defendants during the fishing season at $95 per month, and to have her at the fishery on a day designated, properly manned and "furnished with sufficient cables, anchors, and other tackling." His Honor thought this like a contract for hiring a slave or a house, under which the hirer must pay the hire, though the slave die or the house be burnt. And he was further of opinion that the agreement was satisfied, although there was a defect in the cable, provided it was latent; so that the plaintiff did not know it, and could not, by such an examination as a man of ordinary prudence would make, have discovered it, but really believed, from its appearance, that it was sound and good. From that opinion, we own, ours differs.

(550) The opinion of this court is, although this contract is not a warranty, "that the cable should prove sufficient under *all* circumstances," yet that it is an undertaking and warranty, that, at the time the vessel went into the defendants' employment, it was furnished with cables proper and sufficient for all the ordinary perils of navigation, while attending on a fishery on the north side of Albemarle Sound; in other words, adequate to all emergencies except the acts of God or accidents inevitable by the foresight and diligence of man. The agreement, as ascertained here, is to receive the same construction as if drawn up in a regular charter party. We believe the law is settled, that when the owner of a vessel charters her or puts her up for freight, it is his duty to see that she is tight and staunch, and properly furnished with tackle and apparel, and in a suitable condition for the service, and to keep her in that condition unless prevented by the perils of the sea. Here there was no such peril encountered, no storm, nothing but ordinary weather, which did not interrupt the laying out of the seine; and the cable parted by reason of a defect, which existed at the time of the contract, but was unknown to the plaintiff's testator. But his innocence does not entitle him to recover wages, that were never earned. In his Treatise on Shipping, p. 218, Abbott lays it down, that if the merchant suffer loss, by reason of any insufficiency of the vessel or her furniture at the outset of the voyage, he will be entitled to a recompense. He cites an opinion of Pothier, that, if the ship has been surveyed and reported sufficient, the owner ought not to be answerable for damages occasioned by a defect, which he did not nor could not know. But even Potheir agrees that,

in such a case, the owner must lose his freight. Upon these opinions Abbott comments, stating his own to be, that in the English law, the owner is liable to damages on his covenant, and also to the loss of freight money. His reasons are, that defects in the body of a ship—and much more in her furniture—cannot exist, unless occasioned by the age or particular employment of the ship, or some accidental disaster that may have happened to it, all of which ought to be known to the owner, and (551) ought to lead to an examination of the interior as well as the exterior parts. "And indeed," says he, p. 220, "this contract, although greatly partaking of the nature of the contract of letting to hire, is not precisely the same, but *includes in itself a warranty* beyond that, which is contained in a contract for letting to hire." He proceeds then to state that warranty and its effect in the following language: "In a charter party the person, who lets the ship, covenants that it is tight, staunch and *sufficient;* if it is not so, the terms of the covenant are not complied with, and the ignorance of a covenantor can never excuse him." He then illustrates his position by citing Lord HOLT'S distinction in *Coggs* and *Barnard*, between the contract for the carriage of goods and that of letting to hire; where he says, "the law charges the person" (the master of a ship among others) "intrusted to carry goods, against all events but the acts of God and the King's enemies; so that a common carrier is an insurer against all perils or losses, not within that exception."

This has also been considered as undoubted law in this State, and applied to the case of a vessel performing a voyage at sea. In *Backhouse* v. *Sneed*, 1 Mur., 173, the vessel was lost by reason of an internal and unknown defect in the rudder, which was apparently sound; yet the owner was obliged to make good the cargo to the shipper. Much more clear must it be, that wages cannot be recovered, which the vessel never earned and did not earn for want of sea-worthiness. That the law wisely holds this doctrine will be more apparent from considering the consequences of a contrary rule. The owner, for example, may know of many defects, of which other persons are ignorant, and of which the *scienter* cannot be brought home to him. As Abbott says, he *ought* to know all the defects of his own vessel. The interests risked on her are of too much value, to excuse the want of either diligence or skill in examining into her condition; and to avoid the evils, that might arise from the negligence of the owner in that respect, the law must infer a stipulation by him, that the

condition of the vessel is suitable to the service. Let it
(552) not be said that the shipper may also examine for himself. Such a requirement would break up trade. When one wishes to hire a servant or a house, each person is the best judge of what will suit him, and one person has nearly the same opportunity and competency with another for enquiry and examination. But it is otherwise with respect to ships. Indeed a vessel is often chartered for a voyage, when she is at sea or in a distant port, and therefore the merchant has no opportunity for inspection. But, if it was present, few persons have the knowledge requisite to detect its defects; and it would thus become necessary for every shipper to be at the trouble and expense of a regular survey by a professional person, or be obliged to put up with the representation of the ship-owner, on which he would be liable only on a deceitful affirmation or concealment, of which satisfactory proof is scarcely possible. As one party or the other must run the risk of a defect in the ship, it is not therefore difficult to say, on which, in point of policy and for the furtherance of fair dealing, the law ought to impose it, as a part of the contract implied in chartering a vessel. But when, as here, the agreement is express, that the vessel and her findings are *sufficient*, it can be held to mean no less than that they are *actually* sufficient, and not merely that they are *apparently* so. If this vessel had outlived the accident of losing her cables and anchors, it is clear the owner would have been bound to supply others within a reasonable time. Indeed, the law implies an agreement on the part of the owner to keep the vessel in repair, without any express stipulation to that effect. *Ripley* v. *Scaife*, 5 Barn. & Cres., 167; *Putnam* v. *Wood*, 3 Mass. Rep., 481. This shews that this is not a mere contract for hiring; since, if it were, the charterer would be obliged to supply the parts that gave way, or lose the use of the vessel for the residue of the term. But even if a vessel be sufficient at the commencement of a voyage, but, as here, be lost in the course of it, the owner, though not liable indeed to freighter for damages, loses his freight money. *Kimball* v. *Tucker*, 10 Mass. Rep., 192. At all events, all beyond freight *pro rata itineris peracti*. As to that
there is no dispute in this case, for the defendant sub-
(553) mitted to a verdict for the wages for the time the vessel lived.

PER CURIAM. Judgment reversed and new trial awarded.

Den on dem. of RICHARD GOWING *vs.* JOSEPH RICH.

1. Where land was purchased by A. but the deed of conveyance was made to her daughter B., who became personally liable for a part of the consideration money, a creditor of A. cannot sell this land under an execution at law to satisfy a judgment obtained by him against A. although the land was so conveyed expressly to protect it from the debts of A.
2. It cannot be so sold by virtue of the Statute of Frauds, Rev. St., c. 50, s. 1, because that only avoids conveyances made by the debtor himself.
3. Nor can it be sold under the Act of 1812, Rev. St., c. 45, s. 4, subjecting trust estates to execution, for that only applies to a case, in which the debtor, the *cestui que trust*, could immediately and unconditionally claim a conveyance of the legal estate from the trustee—not to one where the trustee needs the legal title to subserve the rights of himself or of third persons.
4. In the present case B., the grantee and trustee, before she could be compelled to part with the legal title, had a right to be compensated for the money she had paid or to be indemnified for the liability she had incurred in relation to the consideration of the purchase.
5. The remedy of the creditor was in equity, but on a different principle, and that is, the right in equity to follow the funds of the debtor.
6. The cases of *Brown* v. *Graves*, 4 Hawks, 342; *Gillis* v. *McKay*, 4 Dev., 172; and *Dobson* v. *Erwin*, 1 Dev. & Bat., 569, cited and approved.

This was an action of ejectment, tried at Davie Superior Court of Law at Fall Term, 1840, before his Honor Judge PEARSON.

Both parties claimed under one Sheeks. The defendant (554) admitted himself in possession. The plaintiff offered in evidence a judgment in favor of one Alexander against one Chloe Oaks and others, an execution thereon and a sheriff's deed to himself, conveying all the interest of the said Chloe Oaks. The plaintiff then offered evidence to prove, that the said Chloe Oaks in the year 1836, while the suit of Alexander, which was for a debt of about $2,500 was pending, had sold a negro and had sold her home place for $700, and had contracted verbally to buy the land in question of Sheeks for $1,250; that, on the day agreed upon to execute the writings, Sheeks went to the house of Mrs. Oaks, when he was informed by Mrs. Hoskins, who was the daughter of Mrs. Oaks and the widow of one Hoskins, who had died a few years before insolvent, leaving his widow destitute and dependent upon her mother for support, that she was to buy the land and would pay for it and take the deed in her own name. Sheeks expressed himself willing to make the deed to whoever paid him the money, and, accordingly, with the knowledge and consent of Mrs. Oaks, he made the deed to Mrs. Hoskins and received from her $700 in cash, of which $600 was in one hundred dollar bills, and took Mrs. Hoskins' note under seal for the balance, $550. Sheeks stated that he

took Mrs. Hoskins' note without security, because he was told and believed that the land was bound to him for the purchase money. The plaintiff then offered evidence to prove, that Mrs. Oaks had bought and paid for the land; that the $700 paid was her money, which she had handed to Mrs. Hoskins, with the understanding that the deed was to be taken in the name of Mrs. Hoskins to keep off the creditors of Mrs. Oaks; and that Mrs. Hoskins was to execute the note for the balance of the purchase money, but Mrs. Oaks was to pay it. The defendant offered evidence to shew that the $700 was the money of Mrs. Hoskins —that a few months after the deed was executed and after Mrs. Oaks and Mrs. Hoskins had taken possession of their new home, the land in question, he had married Mrs. Hoskins, without notice of any implied trust in Mrs. Oaks, and had been compelled to pay the note of $550 executed by his wife.

(555) The plaintiff's counsel insisted, that, if in fact Mrs. Oaks had bought the land and paid $700 of the price and agreed to pay the balance, and made use of Mrs. Hoskins' name in the deed and in the note, as a cover to keep off creditors, then Mrs. Oaks had a trust estate, which was subject to execution sale under the act of 1812. The defendant's counsel insisted, 1st, that supposing the facts to be as contended for by the plaintiff's counsel and that Mrs. Oaks had an implied trust, the purchaser of this trust under the act of 1812, did not acquire the legal title, but his remedy was in equity. 2dly, That the act of 1812 did not take within its operation an implied trust. 3dly. That the defendant, as husband, was a purchaser for valuable consideration, and, if he married without notice, he was not bound by the trust. 4thly, That, taking the facts to be as contended for by the plaintiff, yet if the jury were satisfied that the defendant had married without notice of the understanding that Mrs. Oaks was to pay the $550 note, and had been compelled to pay the amount himself, then although Mrs. Oaks had a trust to the amount of $700, yet he also had a trust to the amount paid by him, and the case would not come within the operation of the act of 1812. 5thly, That defendant's counsel insisted, as a matter of fact to the jury, that the land was bought and paid for by Mrs. Hoskins for her own use and out of her own money, and insisted that it made no difference how she obtained the money, whether by loan from Mrs. Oaks or from her other relations, or by secreting it out of her husband's effects, provided it was not, at the time she paid it, the money of Mrs. Oaks.

The court charged that to entitle the plaintiff to recover, the jury must be satisfied that Mrs. Oaks had bought the land, and had, for the purpose of avoiding her creditors, resorted to the plan of handing the $700 to Mrs. Hoskins, and getting her to pay it over, and get the deed in her name and execute the note, with the understanding that Mrs. Oaks was to pay the amount of the note when due; that if these were the facts, then, although the legal title was vested in Mrs. Hoskins by the deed of Sheeks, still she held the land in trust for Mrs. Oaks, and this
(556) was such a trust as was liable to execution; and the plaintiff, as purchaser under the sheriff's sale, by virtue of the act of 1812, acquired not only the trust estate of Mrs. Oaks, but also the legal estate of Mrs. Hoskins, and was entitled to recover in this action—that the position taken by the defendant's counsel, that a husband, marrying without notice, was considered in the light of a purchaser for a valuable consideration, discharged of the trust, was not true; for the husband, taking by operation of law, stood in the place of the wife, and took no greater estate, and was bound by the trust, whether he had notice or not—that so far as the $550 note was concerned, if it was a part of the understanding that the note was to be given in the name of Mrs. Hoskins, but Mrs. Oaks was to pay it, then, though the defendant, by marrying Mrs. Hoskins, made himself liable for the note, and had in fact been compelled to pay it; still his paying it would not alter the case, but would only place him in the situation of a security, who had paid money for Mrs. Oaks, without thereby acquiring a lien upon the land or any interest in the land. On the other hand, if the jury were not satisfied that the money was the money of Mrs. Oaks, but came to the conclusion that Mrs. Hoskins had procured it either by loan from Mrs. Oaks or in any other way; or, supposing the money was Mrs. Oaks', if the jury were not satisfied that Mrs. Hoskins gave the note in her name with the understanding that Mrs. Oaks was to pay it, then the defendant would be entitled to a verdict; for if Mrs. Hoskins gave the note expecting to pay it herself, then the trust estate would be divided, and Mrs. Hoskins would hold the land in trust for Mrs. Oaks as to the $700, supposing that to have been her money, and in trust for herself as to the amount of the note, and thus would be presented the case of a mixed trust, which does not come within the operation of the act of 1812.

There was a verdict for the plaintiff; a motion for a new trial for error in the opinion of the court was discharged, and,

judgment being thereupon rendered for the plaintiff, the defendant appealed.

Boyden for the plaintiff.

Caldwell and *Winston* for the defendant.

RUFFIN, C. J. Inthe instructions to the jury, the in-
(557) tention of the parties and the true character of the transaction, upon which the deed was made to Hoskins, were fairly submitted to them. It must, therefore, be assumed, upon this verdict, that the contract of purchase was made by Oaks for her own benefit, that the sum paid, $700, was her money, and that she was to pay the residue of the purchase money, $550; and that she did not give her own note as a security therefor, but procured her daughter to give her note, with the understanding that Oaks should pay it; and that this was done with the view to conceal the interest of Oaks from her creditors and prevent them from seeking satisfaction of their debts out of the land. We are then to treat this as a strong case of bad faith, in which clearly the daughter held upon a secret agreement and in confidence for the mother. In such a case, it would be a reproach to any system of jurisprudence, if it provided no means of reaching the land or the interest of the mother in it, for the payment of her debts. We doubt not but her interest may be made liable for her debts; but the question is, whether it be so liable as to be the subject of sale under a *fieri facias* on a judgment at law, and whether the purchaser at such a sale gets the legal title? Upon that question, after deliberation, we have come to a conclusion differing from the opinion held by his Honor.

Before the act of 1812, which made trust property subject to legal execution, such an interest as this certainly could not be reached at law. It was the constant practice, both in England and this country, for a purchaser to take his conveyance to a trustee; and it was allowed, though such conveyance defeated dower, and prevented the redress of creditors at law, and obliged them to sue in a Court of Equity. The act of 1812 altered and corrected that, in cases, in which a person is seized simply and purely for the debtor, without any beneficial interest in the party having the legal title or in any other person except the debtor in execution. *Brown* v. *Graves*, 4 Hawks, 342; *Gillis* v. *McKay*, 4 Dev., 172. The reason for thus confining the operation of the act is, that it divests the whole legal estate of the trustee,
and, therefore, can only extend to a case, in which the
(558) trustee does not need that title to subserve the rights of himself or third persons. The act embraces, therefore,

only the case in which the debtor in execution might call upon the trustee for a conveyance of the legal estate, or, at the least, if there were several equitable joint tenants for a conveyance of such part of the legal estate, as would be commensurate with his equitable right. The act in no case gives to the creditor of the *cestui que trust* an interest or power over the estate, legal or equitable, greater than that to which the *cestui que trust* may be entitled. The purchaser holds the land exactly as the debtor held the trust. The act does not, therefore, at all proceed on the idea of a fraud in the creation of the trust; or provide that, by reason thereof, the trustee shall be deprived of any interest in himself, derived by the same conveyance. But it is founded on the fact that the debtor, being entitled to the trust, is, in equity and in substance, the owner of the land, and therefore, that it ought to be liable to be sold for his debts. The interest of the debtor, as *cestui que trust*, is the subject of sale and the purchaser can get no more. He therefore is to stand precisely in the shoes of the debtor, except that the debtor would have been obliged to apply to the chancellor to obtain the legal title; whereas the purchaser gets that also by the sheriff's deed. The question then is, whether, as between the debtor in execution and the person having the legal title, the former could, in the state of the dealings between them, call for an immediate conveyance from the latter? Now we are clearly of opinion, that the daughter would not have been compelled to convey to the mother, without first being discharged from her note, given for a part of the purchase money, or, after the money was paid, without its being repaid. If Oaks had given her note and Hoskins had executed it as her surety, the latter would have been entitled to retain the legal title, as a security in the nature of a mortgage. This is the same case in substance. Hoskins gave her note for Oaks' debt, and the latter agreed, as she ought, to pay it. But she did not, and the former paid it; and, being for the purchase money of this very land, the title could not be taken from her, without making her whole. As between these parties, that can-
(559) not be denied. But it is contended, the bad faith towards the mother's creditors is an ingredient in the case, which repels all claim of the daughter upon the land, as against the creditors, and gives them a higher right than the mother. Not, we think, under this act of 1812. We have already endeavored to shew, that the remedy given by it does not stand on the footing of fraud. But another view will render this still clearer. If there was an intention to defraud creditors,

then it is a settled principle, that equity will help neither party to such a contract; and, consequently, the mother could not have had a decree against the daughter for a conveyance, nor could the creditor of the mother, that is to say, by way of insisting on such a trust and asking its execution, since that would be to affirm and enforce a fraudulent intent. The remedy of the creditor is founded on a different principle, which is, the right in equity to follow the funds of the debtor. *Dobson* v. *Erwin*, 1 Dev. & Bat., 569. When the estate was once in the debtor and has been conveyed by him in trust for himself, the redress of the creditor is plain at law upon either of two grounds. He may sell the trust, and that will, under the act of 1812, carry the legal estate; or he may treat the conveyance as fraudulent and null *ab initio* under the act of 13th Eliz. (Rev. St., c. 50, s. 1,) and therefore as leaving the legal title in the debtor. But this last is invoking another statute which is not applicable to a case like that before us; which is not of a conveyance by a debtor of land before owned by her, but that of a purchase by the debtor and a conveyance to a trustee for her. That the statute of Eliz. does not apply to the case of a purchase by the debtor is clear from the consideration, that it operates entirely by *making void* the assurances within its purview. In this case, that would leave the title in Sheeks, the vendor, which would not serve the plaintiff's purpose. As has been already mentioned, however, before the statute 29th Charles 2nd, from which our act of 1812 is taken, purchases were daily made in England in the name of trustees; and, though equity found means of paying out of the estate the debts of the person, who, in (560) the view of that court, was the owner, yet the purchase and conveyance to the trustee were never deemed within the statute of Elizabeth, so as to subject the land to a legal judgment and execution. That was the cause of passing the acts to operate at law on the trusts, *qua* trusts. And they have never been construed to give more to the creditor than the debtor could equitably claim, nor to apply to a case in which the debtor could not, immediately and unconditionally claim a conveyance of the legal estate. As Oaks could not, in this case, have done that, but must have indemnified Hoskins or her husband for the money paid as her surety, in part of the purchase money, the case is not within the act of 1812, and the land was not subject to be sold under execution.

PER CURIAM. Judgment reversed and *venire de novo* awarded.

(561) HANNAH RAGLAND & OTHERS *vs.* CHARLOTTE HUNTINGDON & OTHERS.

1. On the trial of an issue *devisavit vel non*, where the will is propounded by two legatees, one of whom is a colored woman, and the other a white woman, and the caveators are colored persons, the caveators may prove by other colored persons the declarations of the colored woman, one of the parties propounding, in relation to the subject matter of the issue.
2. Where it was proved by one of the only two subscribing witnesses to a will, offered as a will of real estate, that he was requested by the testator to prepare his will according to his instructions, and he did so, and signed his name as a witness before the testator signed, but not in his presence, and then read the will to the testator, and told him he had signed as a witness, and the testator approved and executed it, and the other witness then signed in presence of the testator, *held* that this was not a valid execution of a will to pass real estate, the statute requiring *both* the witnesses to sign *in the presence of the testator.*
3. A will was offered for probate in the County Court—a caveat entered by the defendants—and on the issue being found in favor of the will, both as to real and personal estate, the defendants appealed. On the trial in the Superior Court, the jury found it to be a good will for personal, but not for real estate. *Held* that the plaintiffs had a right to recover from the defendants their costs both in the County and Superior Courts. If the defendants had appealed only from so much of the judgment of the County Court as related to the real estate, then the costs of the Superior Court would have followed the judgment of that Court.
4. The case of *McRainey* v. *Clark*, N. C. Term Rep., 278, cited and approved.

This was an appeal from the judgment of the Superior Court of Law of Cumberland county at Spring Term, 1841, his Honor Judge DICK presiding. The issue tried in the case was an issue of *devisavit vel non*, which came up from the County Court upon the appeal of the caveators, the jury below having found that the paper writing propounded was the last will and testament of George Ragland dec'd, sufficient in law to pass both real and personal estate, and judgment having been rendered accordingly.

On the trial in the Superior Court the caveators con-
(562) tested the validity of the will, both as to real and personal estate, upon the ground, that, at the making of the will, the supposed testator was *non compos mentis.* In support of this proposition two witnesses were offered by the caveators, who were objected to by the plaintiffs, on the ground that they were persons of color, by whom the defendants stated that they expected to prove admissions of Hannah Ragland, one of the plaintiffs, that the testator was of unsound mind at the execution of the will. It was admitted by the plaintiffs, that the testator was a free man of color, that Hannah Ragland, his widow, and one of the plaintiffs, was a free woman of color, and that both the defendants were free persons of color; but it was

equally certain that Rachel Ann Arey was of pure white blood, and this was not denied by the defendants. Whereupon his Honor rejected the testimony. The defendants then insisted that Rachel Ann Arey being an infant within twenty-one years of age, which was not denied, was improperly a party to the record, and, as she did not appear by guardian or next friend her appearance was a nullity; and, therefore, moved that her name be stricken from the record. His Honor replied that, however, he might have disposed of the motion, had it been made at the proper time, he considered it was now out of time, the cause having been put to the jury in its then condition, and he would reject the motion. One of the persons introduced by the plaintiffs as one of the subscribing witnesses to the will (there being but two subscribing witnesses) testified that he was much in the confidence of the testator, that on the evening before the paper writing was signed by the testator, he, the witness, was sent for by the testator, and, upon visiting him, found him in bed, and was informed by him that he had been quite sick, but that he had taken medicine, which had acted well, and he was now much better, and believed himself recovering, but in case of accident, he desired to make his will, and wished him (the witness) to write it for him and become one of the subscribing witnesses, and he wished a Mr. Southerland to be the other—that he (the witness) lived on the next lot to the testator, and Mr. Southerland was also a near neighbor—that the witness took memorandums of the wishes of the testator, which he took home

(563) with him, and there prepared the will—that after writing the will, he wrote the note of attestation in continuation, viz. "Signed, sealed, published and declared to be my last will and testament, this 25th day of September, 1835, in presence of," and then signed his name as a subscribing witness—that on the following morning, when he took the will over to the testator, he, the witness, informed him that he had written the will and signed as a subscribing witness, according to his request, and read over to him the whole will, with the note of attestation and his own (the witness's) name as subscribing witness—that the will was read over to the testator three times, and he approved its contents—that the testator had the will in his own hands and examined it, and, although he was not a scholar, could not write, and could read very little, if at all, he was yet a man of business, and conversant with business papers, and understood well the ordinary forms of executing deeds and other papers, and could tell when one was signed by a subscribing witness—that

the testator then proceeded to sign the paper in his presence and that of the other subscribing witness, and signed it with a perfect knowledge and understanding that he (the witness) had previously signed it as a subscribing witness—that the witness saw the testator sign the paper, and that it was immediately subscribed, at the request and in the presence of the testator, by the other subscribing witness—and that the witness did not renew his signature, but the will was left with the testator, who understood and believed that his will was fully executed. His Honor thereupon charged the jury that the paper writing, under the circumstances of the execution deposed to by the subscribing witness, was not in law a will sufficient to pass real estate; but whether it was sufficient in law to pass personal estate, depended upon whether or not they should be of opinion, from the evidence, that the supposed testator was, at the time of signing the paper, of sound and disposing mind and memory. Under this charge the jury found the paper writing to be the last will and testament of George Ragland, sufficient to pass personal property,

(564) but not sufficient to pass real estate. A motion was thereupon made by the plaintiffs that they recover their costs against the defendants in both courts, and for judgment against the securities to the appeal bond; and on the part of the defendants it was moved that the defendants have judgment for their costs in both courts. Whereupon it was adjudged by the court that the plaintiffs do recover their costs in the County Court, and that the defendants do recover their costs in the Superior Court; but no judgment was rendered against the securities to the appeal. The plaintiffs then obtained a rule upon the defendants to shew cause why a new trial should not be granted, because of error in the charge of the court, upon the point of the due execution of the will as to real estate—and the defendants obtained a rule upon the plaintiffs to shew cause why a new trial should not be granted for error in the court in rejecting the testimony of the colored witnesses, and in refusing to strike out the name of Rachel Ann Arey in the cause. Both rules were discharged, and both parties, being dissatisfied therewith and with the judgment as to costs, prayed an appeal to the Supreme Court, which was granted.

W. H. Haywood and *Strange* for plaintiffs.
No counsel for the defendants.

DANIEL, J. *First;* were the two colored persons, who were offered by the defendants to prove the admissions of Hannah

Ragland, competent witnesses? We are of the opinion that they were competent. In the case of *The King* v. *the Inhabitants of Hardwick*, 11 East, 589, it was decided, that when a suit is pending against a great number of persons, who have a common interest in the decision, a declaration made by one of the persons concerning a material fact within his own knowledge, is evidence against him and all the other parties with him in the suit; because as he is not liable to be called upon to give evidence upon oath of the fact, being a party to the suit, his declaration of it must be evidence for the opposite party. In *McRainy* v. *Clark*, N. C. Term R., 278, it was held that, where the executors and devises are regularly made parties plaintiffs to an issue of *devisavit vel non*, the declarations of some of them were to be

(565)

received. The act of Assembly (1 Rev. St., c. 31, s. 81,) disables people of color, within certain degrees, from being witnesses, except against each other. The defendants are people of color; and the plaintiff Ragland, whose admissions are sought to be given in evidence, is also a woman of color. We think that the witnesses were competent to give evidence of *her* admissions and declarations. It comes within the exception in the statute; and the circumstance that Arey, a co-plaintiff, might be incidentally affected by such evidence, was not sufficient to exclude them. The evidence should have been received and the jury would judge what it was worth.

Secondly. The act of Assembly (Rev. St., c. 122, s. 1,) declares that no will or testament shall be good or sufficient, in law or equity, to convey or give any estate in lands, &c., unless such last will shall be *subscribed in the presence of the testator* by *two* witnesses at least. This will was not subscribed by *two* witnesses in the *presence of the testator*. Much argument has been urged upon us by the plaintiffs' counsel, to bring this case within the meaning of the act; but we think it was the meaning of the Legislature, that the heirs at law should not be disinherited, but by a strict compliance with the words of the act, and that the door to the fraud should be completely shut. The charge of the Judge was therefore right on this branch of the case.

Thirdly. In all actions whatever, the party, in whose favor judgment shall be given, shall be entitled to full costs unless otherwise directed by statute. Rev. St., c. 31, s. 79. The plaintiffs, having prevailed upon the *issue* in the Superior Court, although to a less extent than they had in the County Court, were nevertheless entitled to full costs. If the defendants had appealed from so much of the judgment in the County Court,

as related to the due execution of the will as a will of lands, and permitted it to have been proved as the personal estate, then the costs in the Superior Court would have followed the judgment in that court.

PER CURIAM. Judgment reversed and a new trial awarded.

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(566) HENRY C. FORTESCUE, Adm'r, &c., *vs.* FENNER B. SATTERTHWAITE.

1. A testator devised certain negroes to his three children, J., S. and N. and then proceeded as follows: "In case either of my said children should die without heir lawfully begotten, it is my wish that the property should be equally divided between the children *then living*, whether J., S. or N." J. died first. N. then died without issue, leaving S. surviving. *Held* that under this limitation S., the surviving child, took the property belonging to N.

2. S., the survivor, had previously intermarried with the plaintiff, and after this intermarriage, and before the death of N., the plaintiff conveyed the negroes, now in controversy, being part of those in which his wife had a contingent interest, to the defendant. *Held* that this deed was an estoppel as to the husband, and when his wife acquired a vested interest by the death of N., such interest passed to the defendant by force of the said deed, either upon the principle that interest, when it accrued, *fed the estoppel*, and thereby gave an absolute title, or that the deed operated as a *release* of the wife's *choses in action*.

3. If the words in a deed of sale of goods and chattels plainly evidence a sale, this is sufficient without technical words. Such a deed of sale may be made without any words of "bargain and sale" as well as with those words.

4. Contingent interests, such as executory devises, &c. are assignable. A *possibility* cannot be transferred, but by a *possibility* is meant, the mere expectancy of an heir apparent, or of one who is next of kin to a living man, or the prospect of having a legacy left, &c.

5. The case of *Burnett* v. *Roberts*, 4 Dev., 83, cited and approved.

This was an appeal from the judgment of the Superior Court of Law of Beaufort County, at the Spring Term, 1841, his Honor Judge BAILEY presiding. The case was one of trover, brought to recover the value of three negroes, Violet, Matilda and Bill. These negroes were the children of negro woman Mimy, who belonged to one William Satterthwaite, deceased. The said William Satterthwaite made and published his last will and testament, dated 17th September, 1810. The plaintiff claimed under the following clauses in the said will: "I (567) give and bequeath to my daughter Nancy Satterthwaite, one negro woman named Mimy and Jaban, and one bed and furniture, &c. to her and her heirs forever." The testator,

after making several bequests to his other children, says: "In case of either of said children should die without heir properly begotten, it is my wish that the property should be equally divided between the children *then living*, whether James, Nancy or Sally." The plaintiff died, leaving Sally, the plaintiff's intestate, James and Nancy, his children and the legatees mentioned in the said will. James died first; Nancy then died without issue, in July, 1836, leaving Sally the only survivor. And the question was, whether Sally was entitled to the negroes under the last clause, as aforesaid. The defendant contended that the limitation over was too remote, and the plaintiff could not recover. And, furthermore, he offered in evidence a bill of sale from Nancy Satterthwaite, dated 28th May, 1833, for the negroes in controversy, a copy of which is annexed, marked (B); and, also, an agreement between Henry C. Fortescue and the defendant, dated 27th January, 1834, (after the said Henry's marriage with Sally) agreeing to refer the rights of the said Henry, and the defendant to the negroes of the said Nancy, claimed by them respectively, to the award of certain arbitrators, the decision of the arbitrators in favor of the defendant as regards the negroes now in controversy, and also a bill of sale for these negroes from Henry C. Fortescue and his wife Sally, (the plaintiff's intestate) to the defendant, dated 27th January, 1834, made in pursuance of the award. A copy of this bill of sale is hereunto appended, marked (D.) All which testimony was rejected by the Court. Nancy died intestate, and without issue *in July*, 1836. Sally was a *feme covert*, at the execution of the said deed.

His Honor Judge BAILEY was of opinion that the limitation in the will was not too remote, but that the words, *then living, whether James, Nancy or Sally*, tied up the contingency to the death of the first taker without issue. Under this instruction, the jury returned a verdict for the plaintiff. A new trial having been moved for and refused, and judgment having been rendered, pursuant to the verdict, the defendant appealed.

(568) (B.)

Copy of Bill of Sale from Nancy Satterthwaite.

Know all men by these presents that I Nancy Satterthwaite of the State of North-Carolina and County of Beaufort, for and in consideration of the love & affection which I have unto my nephew Fenner B. Satterthwaite of the aforesaid County and State, and the sum of one dollar to me in hand paid by the said Fenner, &c. do hereby alien, set off and confirm unto my said

nephew Fenner B. Satterthwaite all my right, title, interest and claim which I have in and to the following negroes (describing among others the negroes claimed in the plaintiff's declaration,) all of which described negroes unto my said nephew Fenner B. Satterthwaite, his heirs and assigns, &c. forever. (Then follows a clause of warranty against all persons, claiming by, through, or under her.) Signed, sealed, witnessed and registered according to law and dated the 28th May, 1833.

(D.)

Copy of the deed from Henry C. Fortescue and his wife to the defendant.

Know all men by these presents, that we, Henry C. Fortescue and wife Sally, of the part, and Fenner B. Satterthwaite of the other part, all of the County of Beaufort and State of North Carolina, witnesseth that we, Henry C. Fortescue and wife Sally, do by these presents, for and in consideration of one dollar to us in hand paid by Fenner B. Satterthwaite, the receipt thereof we do hereby acknowledge and ourselves fully satisfied for all our right, title and interest, which we now or may have in and to negro woman Violet and child not named, Matilda and Jim, formerly the property of Nancy Satterthwaite—and we, the aforesaid Henry C. Fortescue and his wife Sally, do for ourselves, our heirs, executors and administrators covenant to and with the said Fender B. Satterthwaite to warrant and defend the title of the said negroes from the proper claim of all persons claiming by,
(569) from or under us, to the only proper use and benefit of him the said Fenner B. Satterthwaite, to him, his heirs, executors, administrators and assigns. As witness, our hands and seals, this 27th Jan., 1834.

Signed, sealed, witnessed, delivered and registered, all according to law.

J. H. Bryan, for the plaintiff.
W. H. Haywood and Iredell, for the defendant.

DANIEL, J. This is an action of trover for the conversion of three slaves. Pleas, The *general issue* and *release*. William Satterthwaite in the year 1813 bequeathed legacies to each of his three children, James, Nancy, and Sally. The testator, after making several other devises and bequests in his will, then proceeds and says, "In case either of my said children should die without heir lawfully begotten, it is my wish that the property should be equally divided between the children *then living*,

whether James, Nancy or Sally." The said three children were alive at the death of their father. Afterwards James first died; Nancy then died without issue (in July, 1836,) leaving Sally the only survivor. The slaves in controversy were a part of those bequeathed to Nancy as aforesaid. Sally had married the plaintiff Fortescue; and she and her husband on the 27th January, 1834, executed to the defendant, then in possession, the deed for the said slaves, marked in this case with the letter (D.) Sally, the plaintiff's wife, died, and he, as her administrator, has brought this action. The Judge was of opinion, that the contingent interest or executory devise, which each one of these children had in the legacies to the other children, was not too remote; but that the words "*then living, whether James, Nancy or Sally*" tied up the contingency to the death of the first taker without isssue. But the judge refused to permit the aforementioned deed from the plaintiff to the defendant to be received in evidence. The plaintiff had a verdict and judgment, and the defendant appealed.

We agree with the Judge that, in this case, the limitation over to Sally, the survivor of the legacy given to Nancy, on her dying without issue, was not too remote; but that it was
(570) a good executory devise. The meaning of the testator is plain, that on any one or two of the children dying without issue, the survivor or survivors, *then living*, whether James, Nancy or Sally, should have the legacy, which had been before given to the one so dying. The contingent interest, if it ever could vest, must necessarily vest during the period of a life or lives, that were in being at the death of the testator. The words "*then living*" tie up the limitation during the lives of the three children.

We do not agree with the Judge in the rejection, as evidence, of the deed, which Fortescue and wife executed to the defendant in 1834, and during the life of Nancy. It is true, as stated in the argument, that a possibility cannot be transferred at law. But by a *possibility* we mean such an interest, or the chance of succession, which an heir apparent has in his ancestor's estate; which a next of kin has of coming in for a part of his kinsman's estate; which a relation has of having a legacy left him, &c.: Such interests as these, we conceive, are the true technical *possibilities* of the common law. 2 P. Wil., 181; *Whitfield* v. *Faucet*, 1 Ves., 381; Atherley on Mar. Sett., 57. But executory devises are not considered as mere *possibilities*, but as *certain interests* and *estates*. *Gurnel* v. *Wood*, Willes, 211; *Jones* v.

Roe, 3 T. R., 93. In the last case the Judges seem to have considered it as settled, that contingent interests, such as executory devises to persons who were certain, were assignable. They may be assigned (says Atherley, p. 55) both in real and personal estate, and by any mode of conveyance, by which they might be transferred, had they been vested remainders. In the present case, however, it is unnecessary to discuss the question how far the deed would have bound the wife, in case the husband had died before the contingency happened, and left her surviving. The deed, as to the husband, is an estoppel, and when his wife acquired a vested interest, to wit, in 1836, on the death of Nancy, the said interest passed to the defendant by force of the said deed, either upon the principle that the interest, when it accrued, fed the estoppel (*Doe ex Dem. Christmass* v. *Oliver*, 2 Smith's Select Cas., 417,) or the deed operated as a release of
(571) his wife's *choses in action*. If the deed be considered as a release, the interest of the wife, as well as that of the husband, was by it extinguished, and there was nothing left to survive to her administrator. *Burnett* v. *Roberts*, 4 Dev., 83; 1 Shep. Touch, 333; 2 Do., 161, Preston's Ed.; 1 Roper on Hus. & Wife, 232. It is contended for the plaintiff that the deed has no conveying words in it; that it is but an agreement or covenant under seal, and therefore that it cannot operate as an assignment. The answer is, that a deed of sale of goods and chattels may be made, without any words of bargain and sale, as well as by those words. 1 Shep. Touch., 388, (Preston's Ed.) If the words in the deed plainly evidence a sale, it is sufficient without technical words: we think that is the case in this deed. If the deed be considered as a release, the words, we think, are sufficient to operate as such. If one do acknowledge himself under seal to be satisfied and discharge a debt, this is a good release of the debt. 2 Shep. Touch., 160, Prest. Ed. In this deed the plaintiff acknowledged himself satisfied for his right and title, which he then had or might thereafter have in the said slaves. On the death of Nancy, the plaintiff's wife had a vested estate. The release of the husband to the defendant in possession must therefore have the effect of destroying that title in and to the slaves, which, without the release, the husband had, at that instant of time, a right to receive from the defendant and reduce into his own possession. We think there must be a new trial.

PER CURIAM. Judgment reversed and a new trial awarded.

(572) Den ex dem. CHARLES T. SAUNDERS *vs.* THOMAS McLIN.

1. A sale made by the sheriff of Craven, on a distress for taxes due to the town of Newbern, must, in pursuance of a private act of 1818, be made in the same manner as a sale by distress under the general law for collecting the taxes due to the State, with the exception of a few particulars which relate, for peculiar reasons, to the public revenue; and with the exception also of the mode of advertising.
2. A sale, therefore, of an *entire* lot in the town of Newbern, for the town taxes due on it, is void, and the sheriff's deed conveys no title to the purchaser.
3. The cases of *Jones* v. *Gibson*, No. Ca. T. R., 41, and *Avery* v. *Rose*, 4 Dev., 549, cited and approved.

This was an action of ejectment, tried at the Spring Term, 1841, of Craven Superior Court of Law, before his Honor Judge BAILEY. It was brought to recover possession of a lot in the town of Newbern. Taxes on this lot had been duly assessed by the commissioners of the town of Newbern, and being due and unpaid, the sheriff proceeded to collect them by a distress on the lot, and after giving due and legal notice, sold the *entire* lot at public auction to the lessor of the plaintiff, and gave him a deed for the same, under which the plaintiff claimed title. The defendant was proved to be in possession of the premises sued for. It was contended by the defendant that the sheriff had no authority to sell the *whole* lot to a private person for the payment of the taxes—that if no person would pay the taxes for less than the entire lot, it should have been bid off by the sheriff in the name of the Governor—and that no return had been made by the sheriff to the County Court as directed by the general revenue law; and that therefore the sale and conveyance of the sheriff were void. Other objections were made to the plaintiff's recovery, but it is immaterial to state
(573) them, as they are not noticed by the court in delivering their opinion. His Honor being of opinion that the sheriff's sale and deed conveyed no title to the lessor of the plaintiff, the plaintiff submitted to a non-suit, and appealed to this court.

J. H. Bryan for the plaintiff.
J. W. Bryan for the defendant.

RUFFIN, C. J. One of the objections taken on the trial seems to the court to be fatal to the plaintiff's title; and it will therefore be sufficient to explain the grounds of our opinion upon that point, without adverting to the others.

Before the act of 1792, C. 2, lands were not liable to distress for public taxes, but they were collected by distress and sale of

goods and chattels. Iredell's Rev. 1782, c. 7, s. 9, 1783, c. 10, s. 8. By the private act of 1779, c. 4, "For the regulation of the town of Newbern," which is sent up as part of the case, the town taxes were also to be collected by distress and sale of the delinquent's goods and chattels. Such was the state of the law, as to the mode of collecting both the public and local taxes, before the 15th of November, 1792. In 1791, a private act was passed, which is also a part of the case, whereby the town taxes of November were made recoverable by warrant before a justice of the peace out of court, and execution. And in the last section of the same act it is provided, "that it shall be lawful for the commissioners of the town of Newbern, for the time being, to cause the taxes of the said town to be collected either in the manner herein before directed, or as the law directs for the collection of public taxes." Under this authority the commissioners passed an ordinance in 1816, in these words: "The Act of the General Assembly of the year 1791, requiring the commissioners to direct the manner, in which the payment of the town tax shall be enforced, it is ordained that the collector shall collect the tax, when in arrear, by distress and sale of the personal property of the delinquent, if any to be found; if none, then by distress and sale of the lots or parts of lots, upon which the tax is in arrear and unpaid: conforming, in either case,
(574) to the regulations of the Acts of the General Assembly, directing the manner of enforcing the payment of public taxes."

It may be observed in the beginning, that the act of '91 uses the words, "as the law directs for the collection of public taxes;" which, speaking in the present time, may perhaps be confined to the law, as it *then* stood, for the collection of the taxes. If so, the commissioners exceeded the authority given to them by that Act, when, in 1816, they ordered the distress and sale of lots for taxes; since the act, which authorized that, as to the public revenue, did not pass until the next year, namely, 1792, c. 2. Consequently, under that construction of the Act of 1791, the ordinance would be unauthorized and inoperative, as respects the sale of the lot; and the sale made by the sheriff must be held to be void. But if that be not the proper construction of that statute, and, as we rather suppose the meaning be, that the commissioners, for the time being, may direct the taxes to be collected by warrant, or in the manner the law now directs or *may* direct; in that case, also, the plaintiff's title fails. The words of the ordinance, "conforming in either case" (that is to say, in

the sale of personal or real property) "to the regulations of the Acts of the General Assembly, directing the manner of enforcing the payment of public taxes," must receive a similar construction; so as to require the proceedings in a sale of a lot for the town tax to conform to the law, existing at the time of the sale, directing the manner of distraining and selling the same lot for a public tax. It is not, however, of any consequence to consider that point further, since the private act of 1818, "to amend the laws, regulating the town of Newbern," speaks a language on this subject, so distinct that it cannot be misunderstood. Instead of the taxes being collected by collectors, appointed by the commissioners, and in a mode to be designated by them, this act makes it the duty of the sheriff of Craven county to collect them, and vests him "with the same power and authority to collect the said taxes by distress or otherwise, as *by law* sheriffs *are* or *may* be authorized to collect the public taxes." By this act, therefore, it is clear, that in each case of a distress and sale for a tax of this town, the sheriff is to observe
(575) the rules and regulations by the law, for the time being, established for a distress and sale for public taxes; except that the private act provides specially for the mode of giving notice of the sale.

Now whether we recur to the public law for collecting the revenue of the State, as it stood when the ordinance of 1816 passed, or in 1818, or at the time of the sale to the lessor of the plaintiff, such a sale as that made in this case is contrary to the law, and invalid. There can be no sale to a private person of an entire lot or other parcel of real estate for the taxes due on it. The Act of 1792, c. 2, s. 5, authorized a sale out and out, as upon an execution, and conveyance by the sheriff. But that was altered by the subsequent act of 1798, c. 492, s. 1, which enacts that the sheriff shall set up the lands to be sold to the person, who will pay the taxes for the smallest part thereof; and he shall strike off the quantity so bid or offered to be taken for the amount of the public, poor and county taxes and charges, to the person offering to take the smallest quantity. This has continued to be the law from that day to this. Rev. St., c. 102, s. 55. The act then directs how and when the quantity purchased shall be laid off, its form, and other matters for completing the title. In a subsequent part of the act, s. 4, provision is made for a sale and conveyance to the Governor for the use of the State, and no person shall bid a smaller quantity than the whole. Upon the trial of this case it was contended for the defendant, that this

provision, and also those of the act of 1819, Rev. St., c. 102, s. 60, 52 and 53, which directs the sheriff to make returns to the County Court of the land to be sold and of those sold, were, by the force of the acts of 1791 and 1818, incorporated into the law for the sale of land for a town tax; and, consequently, that the sale, under which the plaintiff claims, is void. We rather suppose the contrary, inasmuch as those provisions relate, for peculiar reasons, to the public revenue, and seem inapplicable to such a sale as that under consideration. But admit those parts of the act not to operate upon a sale for a town tax, nevertheless the first section of the act of 1798 must embrace it. The act provides for two cases; a purchase by a private person, and one in behalf of the State; and they are perfectly distinct. *Avery* v. *Rose*, 4 Dev. Rep., 558. Under no circumstances can (576) the sheriff strike off the land to the Governor, but where no person shall bid a smaller quantity than the whole of the lands, and then he must strike off the whole to the Governor and not less. And under no circumstances, without exception, can he strike off the whole to any person but the Governor. A private person can only purchase by taking a less quantity than the whole. We can see no ground, upon which we can take the case of a sale for a town tax out of the operation of this provision, the words of which clearly include it. It may not be proper, and, we think, would not, to have struck off this lot to the Governor for the town tax, with which the Chief Magistrate of the State had no connection. But it may well be, that the Legislature did not intend that the whole of any person's free holdshould be taken from him for any tax or taxes, public, county or town; and preferred rather the tax to be lost. At all events the law is positive and must be obeyed. That being so, the sheriff exceeded his authority in selling and conveying the whole lot; and, upon the principle of *Jones* v. *Gibson*, No. Ca. T. R., 41, and *Avery* v. *Rose*, 4 Dev., 549, the deed to the plaintiff's lessor is void, inasmuch as it shows upon its face, that the sheriff exceeded his authority and that the purchaser must have known it.

PER CURIAM. Judgment affirmed.

(577) HULL THREADGILL AND OTHERS *vs.* THOMAS INGRAM.

1. A testator devised as follows: "I leave the whole of my other estate as well negroes as goods and chattels to be equally divided between my four children A., B., C. and D., and for my executors to have it appraised and

pay off each child's part as they shall come to age, the boys to have their part at the age of 21 years, and the girls to have their part at the age of 18 years; *and if either of my children die without heir lawfully begotten, then his or her part to be equally divided between my surviving children, and their heirs forever.*" A. died first, leaving children. B. afterwards died leaving no children. *Held* that the limitation over in the will was not too remote; that on B.'s death without issue, his share became vested in C. and D., who survived him: and that, as A. did not survive him, no part of such share vested in the personal representative or the children of A.

2. The cases of *Zollicoffer* v. *Zollicoffer*, 4 Dev. & Bat., 438, and *Gregory* v. *Beasley*, 1 Ired. Eq. Rep., 25, cited and approved.

This was an appeal from the judgment of the Superior Court of Law of Anson County, at Spring Term, 1841, his Honor Judge DICK presiding, upon the following case agreed:

Action of detinue for a slave named Abram, which the defendant admits is now and was in his possession, when demanded by the plaintiff immediately before the bringing of this action, and he admits that he refused to deliver him to the plaintiff. It is admitted that George Ingram died in the year 1775, having first duly made his last will and testament, which was duly proved. The following is a copy of so much of the will as relates to this case: "I leave the whole of my other estate, as well negroes as goods and chattels to be equally divided between my four children, John Ingram, Tabitha Ingram, Jesse Ingram and Nancy Ingram, and my executors to have it appraised and pay off each child's part as they shall come to age, the boys to have
(578) their part at the age of twenty one years, and the girls to have their part at the age of eighteen years; and if either of my children die without heir lawfully begotten, then his or her part to be equally divided between my surviving children and their heirs forever." The said testator left surviving him the four children named in his will, to wit, John, Tabitha, Jesse and Nancy. John died in the year 1800 leaving two children. Jesse died in October, 1835, without ever having had any children. Tabitha died in March, 1836, leaving children. The plaintiffs, Hull and Patrick Threadgill, obtained letters of administration on the estate of the said Tabitha. The plaintiff Nancy is the survivor of the said four children of the said testator, and is the wife of the plaintiff, John Howlett. The slave sued for is the grandson of a female slave obtained by the said Jesse under the will of the said testator, with the assent of the executor of the said will; the said Jesse having arrived to the age of twenty-one years. The said Jesse also left a last will and testament, which has been duly proved, and Jeremiah Ingram, the executor therein named, duly qualified and took upon him-

self the execution thereof. The slave sued for is held by the defendant, as the agent of the said Jeremiah, the executor of the said Jesse.

If, on this statement, the plaintiffs be entitled to recover in this action, the judgment to be rendered for the plaintiffs; if not, then judgment to be rendered for the defendant. If judgment be rendered for plaintiffs, the slave sued for is of the value of $700, and the damages for detention are agreed to be $200. And the court thereupon, *pro forma*, rendered judgment for the defendant, from which the plaintiffs appealed.

Winston, for the appellants, contended that the limitation over in the will was not too remote, and that on the death of Jesse without issue his entire interest vested in Tabitha and Nancy, who survived him; and he cited the following authorities: *Southerland* v. *Cox*, 3 Dev., 394; *Jackson* v. *Chew*, 12th Wheaton, 153.

W. H. Haywood, Jr., for the defendant, insisted that the remainder was too remote, and cited *Rice* v. *Satterwhaite*, 1 Dev. and Bat. Eq., 69; *Massy* v. *Hutson*, 2 Mer., 130; (579) Ward on Legacies, p. 185, 240, 241; *Barlow* v. *Salter*, 17 Ves., 481; 2 Powell on Devises, 723. He also insisted that the representatives or children of John, who had died before Jesse, were entitled to Jesse's share, as in this case the word "survivors" in the will should be construed "others;" and for this he cited 2 Powell on Devises, 723, (new edit. in Law Library;) Ward on Legacies, p. 185.

DANIEL, J. This is an action of detinue to recover a slave by the name of Abram. Plea *non detinet*. In the year 1775, George Ingram made his will, and, after some devises of land, he says, "I leave the whole of my other estate, as well negroes as goods and chattels, to be equally divided between my four children, John, Tabitha, Jesse and Nancy Ingram; my executors to pay off each child's part, as they shall come to age; the boys to have their part when they come to the age of twenty-one years, and the girls to have their part at the age of eighteen years. And if either of my children die without heirs lawfully begotten, then his or her part to be equally divided between my surviving children and their heirs forever." John died in the year 1800, leaving two children. Jesse died in 1835, never having had children. Tabitha survived him, and died in 1836, and the two Threadgills, plaintiffs, are her administrators. Nancy is still alive, and she and her husband Howlett are the other plaintiffs.

The slave Abram is a descendant of a female slave, obtained by the legatee Jesse, under the will of his father with the assent of the executors. There was a demand of the slave before the writ issued, and the defendant refused to deliver him. The court being of opinion, *pro forma*, that the plaintiff could not recover, there was judgment for the defendant, and the plaintiffs appealed.

We think the Judge erred in deciding that the law was in favor of the defendant. It seems to us that this case is clearly within the principles decided by this court in the two cases of *Den ex dem. Zollicoffer* v. *Zollicoffer*, 4 Dev. &. Bat., 438, and *Gregory* v. *Beasley*, 1 Ired. Eq. Rep., 25. In the first case, the testator, having devised lands to three of his sons, and (580) personal estate to his daughter, says, "And in case of the death of either of my aforenamed children, without a lawful heir begotten of his or her body, that then his or her part shall be equally divided among the survivors." It was held, that, upon the death of one of the sons without children, the land he had acquired under his father's will went over to his surviving brothers and sisters, and that limitation was not too remote. In the latter case, a testator had bequeathed all his personal property to his four children, to be equally divided between them when his son A. arrived at the age of 21 years; and if one or two or three should die under age, or *without issue*, for all the property to go to the surviving ones for ever. A daughter died before her arrival at full age, leaving no children, but after A. had attained twenty-one years. *Held* that her share went over to the survivors then living; and that a child of a sister, who had died after attaining full age, was not entitled to any part of it. In the argument of the case before us, it seems to be admitted that it is the law of this State, that when property is given by will to children or a class of persons, and a limitation over to the survivor or survivors of the share or shares of any such children or class, who should "die without issue," or without "heirs lawfully begotten," that the limitation over is good as an executory devise. But it is contended, that, when the testator, to the words, "survivor or surviving children" superadds the words, "and their heirs forever," that circumstance will repel the inference, that the testator intended, that those only of his other children should take, who should be alive at the death of any one of them without issue. It is argued, that those superadded words make the limitation too remote. In *Hudson* v. *Massey*, 2 Meriv. Rep., 133, Sir WILLIAM GRANT admits that in a bequest to two persons, with a limitation to the

survivor in case either should die without issue, this is a good limitation. He says it furnishes the presumption that the survivor was individually and personally to take and enjoy the legacy. But he thought the superadded words, "his or her executors, administrators or assigns," excluded the presumption that it was a mere personal benefit, that was intended for the survivor.

He said, that, though there should be no such failure
(581) of issue as would enable him to take personally, yet his representatives would be entitled to claim, in his right, whenever the failure of issue might happen. Now, with all due deference to so great a judge, it seems to us an impossibility, that any representative could ever urge such a claim as that supposed by Sir William Grant. Must not the representative deduce his title by averring that his principal was the survivor? Could the representative have any pretence of claim without such an averment? We think he could not. If, therefore, the representative's principal was actually the survivor, he, the principal, must inevitably be permitted to take personally, and all chances of a perpetuity would of course cease. In the case now before the court, the superadded words ("and their heirs forever") appear to us to have been inserted, only to denote the extent of the interest in the property, that the survivors should take, and not as a limitation to a description of persons, who might at any indefinite time claim as *heirs*. How could a person claim as heir to a survivor, if the ancestor was not *in esse* at the death of the first taker, so as to acquire the character of survivor? The thing appears absurd. It seems to us, that no other presumption can arise in this case, but that the testator intended a personal benefit to the survivors, and that the superadded words, which he has made use of, do not repel the presumption. *Hughs* v. *Sayer*, 1 P. W., 534.

Secondly: John died in the year 1800. Did his two children or his representative take? We think they do not take. The executory devise to John, in the legacy given to Jesse, was contingent; and, as John did not survive Jesse, the executory devise never vested in him; and, therefore, there was nothing to be transmitted either to his representative or children. We so decided in *Gregory* v. *Beasley*. The case of *Wilmot* v. *Wilmot*, 8 Ves., 10, is not an authority for the defendant. It was a bequest to three children in thirds respectively, with a direction that they should not be put in possession, till their respective attainment of particular ages (the son at 25, the two daughters at 21 years,) and in case of the death of either of the said chil-

dren before the ages mentioned, that third to be equally
(582) divided between the two surviving children; and in case of the death of two of the children before they should obtain their respective ages, *then* the whole estate to devolve to the testator's two brothers. One child attained the age mentioned—of course the two brothers, the ultimate remainder men, then could never take. Afterwards another child died under age. And it was determined that the share of the latter was a *vested interest* in the child who died first, and the survivor attaining the specified age. The executory devise *vested* in those children that obtained the ages specified; and if they died afterwards, and then a younger child died under age, the share so being *vested*, devolved on the representative of the child, that had survived the specified age and first died. The peculiar circumstances of the case induced Lord Eldon to put upon the word "survivor" a construction, which he admitted was not the natural or usual one. But in this case, the contingent estate, that was limited to John, never became vested; it could not vest, unless he had survived his brother Jesse: he did not, and his contingent interest has vanished forever. The judgment must, therefore, be reversed, and judgment be entered for the plaintiffs on the case agreed.

PER CURIAM. Judgment accordingly.

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(583) Dem ex dem. HENRY K. BURGWYN & al. *vs.* THOMAS P. DEVEREUX.

1. A died in the year 1777, leaving two sons, Thomas and George. Thomas was the oldest son, and, by the laws of this State as it then stood, sole heir to his father. A. devised the land in controversy in this suit to his second son George. George died in 1839, intestate and without issue, leaving surviving him a sister of the whole blood, under whom the defendant claimed, and the issue of a sister of the half blood on the mother's side, who are the lessors of the plaintiff. *Held* that the issue of the sister of the half blood took one moiety of the land.
2. The cases of *Baltard* v. *Griffin*, 2 Law Rep., 258, and *Outlar* v. *Outlar*, 2 Hawks, 324, cited and approved.

This was an appeal from the judgment of the Superior Court of Law of Jones County at Spring Term, 1841, his Honor Judge BAILEY presiding, upon the following case agreed:

This action is brought to try whether the premises set forth in the declaration descended to the lessors of the plaintiff in common with Frances Devereux, or whether the said Frances was seized of them in severalty; and upon this question the follow-

ing statement of facts is submitted as a case agreed. George Pollok died in April, 1839, seized in fee of the land in question, to which he succeeded by devise, upon the death of his father, Thomas Pollok, the elder, under the will of the said Thomas, a copy of which, so far as it regards this question, is made a part of this case. Thomas Pollok, the elder, succeeded to the land by descent upon the death of his father, he, the said Thomas, being the oldest son. Thomas Pollok the elder died in the year 1777, leaving two sons, Thomas, now deceased, and the abovementioned George, of whom Thomas was the oldest, and a daughter, the said Frances Devereux. Thomas died without issue in the year 1803 or 1804. George also died intes-
(584) tate and without issue, leaving the said Frances his only sister of the full blood and of the blood of the said Thomas the elder. The lessors of the plaintiff are the children of Sarah Burgwyn, who was the daughter of the widow of the said Thomas, by a marriage subsequent to his death, and was a sister of the said George of the half blood on the part of his mother. The said Sarah died before the said George, and if she (had she survived the said George) would have inherited any of the said land, then the lessors of the plaintiff have the same title. The defendant, Thomas P. Devereux, representing the said Frances, is in the actual and exclusive possession of the land, and claims to hold the same in severalty adversely to the right of the said lessors. If, upon the foregoing facts, the lessors of the plaintiff have any title to the premises in dispute, then judgment is to be entered for the plaintiff; if they have no title, then judgment is to be entered for the defendant.

Upon this case agreed the court (*pro forma*) gave judgment for the plaintiff, and the defendant appealed to the Supreme Court.

Extract from the will of Thomas Pollok the elder, referred to in the case.

Item. I give and devise unto my son George Pollok and his heirs and assigns forever all my lands, tenements and hereditaments that I have and hold in fee simple in North Carolina, he paying unto my said wife the aforesaid annuity or yearly sum of five hundred Spanish milled pieces of eight, from his attaining the age of twenty one years during the natural life of my said wife.

The case was argued elaborately by *Winston and Kinney*, with whom was *A. Moore*, on the part of the defendant, the

appellant; and by *W. H. Haywood, Jr., and Iredell* for the plaintiff, the appellee. (The Reporter regrets that he cannot present these arguments *in extenso*, particularly those of the appellant, for want of room. And he is unwilling to
(585) attempt to condense lest he might do them injustice. The principal points relied on, however, will be found in the opinion of the court.)

RUFFIN, C. J. The lessor of the plaintiff claims to be tenant in common with the defendant, by a descent of the premises in dispute from George Pollok; and the defendant, admitting what is equivalent to an actual ouster, if the parties be tenants in common, yet insists, that the premises descended to Frances Devereux alone. The question, therefore, is, who is or are the heir or heirs of George Pollok, in respect of this land.

Here, it may be well to say at once, that the answer to that question, and to every other that can be raised as to a descent since 1808, depends, and depends exclusively, upon the act passed in that year, and re-enacted among the Revised Statutes of 1836. That act embraces the whole subject of descents, and, consequently, repealed the law, which previously existed, whether it existed as a part of the common law or in the form of a Statute. It is to be seen, therefore, how the act of 1808 applied to the case before us.

The *propositus* died in 1839, leaving no issue; and the present parties claim as his collateral heirs. The case may be simplified by considering that Sarah, who is represented by the lessor of the plaintiff, and was a maternal sister of Mr. Pollok, survived him; so that upon his death, he may be supposed to have left the two sisters, Mrs. Devereux and Mrs. Burgwyn—the former of the whole blood; the latter, of the maternal line only. The first thing to be noticed is, that the fifth and sixth sections of the act abrogate the incapacity of the half-blood, as such, to inherit, which had once existed. It is thereby expressly enacted, that collateral relations of the half-blood shall inherit equally with those of the whole blood; and, also, that relations of both lines shall inherit equally in all cases, excepting only two: which are those provided for in the fourth section of the act, namely, first, where the inheritance has been transmitted to the *propositus* by descent from an ancestor; or, secondly, where it has been derived by gift, devise, or settlement from an ancestor, to whom the person thus advanced (the *propositus*)
(586) would, in the event of such ancestor's death, have been the heir or one of the heirs. In those two cases the

fourth section provides, that the inheritance shall descend to the next collateral relations of the *propositus*, who are of the blood of the ancestor, from which it fell or was derived. The effect of the act, therefore, may be shortly stated to be, that purchased estates—in the popular sense of the term, purchase—descend to the nearest relations, whether of the paternal or maternal line; and that descended estates and certain purchased estates (which the act puts on the same footing with those descended) descend to the nearest relations, of the blood of the ancestor or person from whom the estate moved. Our enquiry is, then, narrowed to the point, whether George Pollok derived his inheritance by one of those peculiar purchases, enumerated in the fourth section, so as to define the descent from him to the blood of his father, Thomas the elder, and vest the inheritance in Mrs. Devereux. This question has been argued with zeal and at much length, particularly on the part of the defendant; and the court has given an earnest and deliberate attention to everything that was said. But, after doing so, we all think as we did on the opening of the argument, that the case is not within the fourth section of the act.

Thomas Pollok, the father, owned the land in fee; and in 1777, (when the elder son was, by law, the heir) he having two sons, Thomas and George, devised the land in fee to George, the second son; and the father died the same year, leaving both of the sons surviving him.

It is to be observed, in the first place, that George did not get this land by descent. It would have been thus transmitted, notwithstanding the will, if he had been the heir of his father. But he was not then, the heir, and could only claim under the will. As, therefore, he was in by device and could not have claimed as heir to his father, had the latter died intestate, the case is neither within the words or meaning of the Legislature as it seems to us. The act was intended to provide for every case; and there is no doubt, that it applies to all estates, whether vested before or after the passage of the act. The period of the
(587) acquisition is not at all material. But the mode of acquisition by the *propositus*, whether by descent or *quasi* descent—if the expression may be allowed—determines its quality as an estate descendible to relations of a particular line, in exclusion of those of the other. Now, whether an estate be derived by descent or by purchase, is a fact, simply; and that, necessarily, is determined at the time the estate is derived. The fact, that it was derived in the one mode or the other,

instantly imparted to the estate, upon its acquisition, the quality, as a descendible estate, of going, upon the death of the new owner, to all his relations or to a particular line. We can conceive no instance, in which the character of an acquisition, whether by descent or purchase, is not indelibly impressed on it at the time it is made. Why, the very terms that must be used to state a case, prove this. For example, when it is asked, "when and how did George Pollok get this land?" the case itself answers, that he got it in 1777, not as the heir of his father, but as a purchaser under the will of his father, which was made and went into effect that year. Some years after the death of the father, a law was, indeed, made, which constituted all the sons heirs. But this law could not make this person then take by descent that which he had long before taken by devise and purchase. *Ballard* v. *Griffin*, 2 No. Ca. Law Rep., 258. The case before us is that of an immediate devise of the inheritance in fee; and in its application to such a case the act is so clear, that it seems impossible to render it more so by comment. But we deem the cases of gifts and settlements equally plain. The donation of each kind, specified in the fourth section, is one, which has been derived from an ancestor, to whom the person advanced would, in the event of such ancestor's death, have been the heir or one of the heirs. The donation is, obviously, one which is merely in anticipation of a descent; that is to say, made to a person, who would, in case the donor had not made the donation and died intestate, have taken the same estate or an estate of inheritance in some form in the same land or some part of it. To what period are we to look to ascertain, whether the donor and donee stood in the same relation to each other? We can imagine no other than that at which the donation was
(588) made. Besides the general reason, that the nature of an acquisition is conclusively fixed at the time it first accrued, this act itself furnishes evidence that the writer had that principle in his mind, or, more probably, that unconsciously he acted on it from habit. The phrases, "*has been* transmitted or *has been* derived," being in the past time, necessarily refer to the period, at which the estate was acquired in one or the other of the modes mentioned. Then the words, "*would have been heir*," with the like necessity attach themselves to the same period. This construction is irresistibly confirmed by the subsequent words, "in the event of such ancestor's death." There is merely a substitution of a donation made at a particular day, for a descent upon the death of the donor, happening, or, rather sup-

posed to have happened, at the same time. In the cases of a taking by descent or devise, there must be an actual death of the ancestor. But with respects to gifts and settlements it is otherwise, and the death is merely supposed. Unquestionably it is supposed—for the purpose of determining whether the donee was heir to the donor—to have happened, *instead* of the execution of the instrument, which passed the estate. "*Would have been heir*" can refer to no other period; and embraces only the cases of such a donation to one, who was *then* an heir apparent or heir presumptive. It is the same as if the act had used the words, "would have been heir or one of the heirs," *in case*, or *if*, the ancestor had then died.

It is a consequence from these positions, that we must resort to the law as it stood, or may stand, at the time of the death of an ancestor, from whom land came by descent or devise, or at the time of the supposed death of one, who gave or settled land, in order to ascertain, who *was* the heir, where the ancestor was dead, or who *would have been* the heir, if the ancestor had then died. If, for instance, a law should at this day be passed, admitting new heirs, and an estate should be derived under that law by descent or by any of the other modes mentioned in the fourth section of the act of 1808, it could not be denied that the descent of that estate from the new heir, would be regulated by the act of 1808. So, the various changes
(589) of the law before 1808, by which that or this person was made heir, from the common law down, must have a like effect in determining, whether an estate *was* derived by descent by the person last seized, or *would have been*, in case the former owner had not conveyed to the *propositus*, but had, at the time of such conveyance, died intestate. Thus, the act of 1808 operates upon every case alike, though the result may be different in different cases, from the varying states of fact in the several cases.

On the other hand, it has been contended on the part of the defendant, that the person mentioned in the act as one, who "would have been heir, or one of the heirs" of the donor, is the heir as constituted by the act of 1808; and that the period, at which that character is to be ascertained, is the death of the *propositus*. The grounds on which these positions were founded in the argument were, that the act of 1808 was designed to produce one uniform and plain system of descents, instead of that previously existing under the acts of 1784, on which many doubts had arisen; and, especially, that it was designed to preserve a man's acquisition to his descendants or in his family, as

long as there are any, in exclusion of those not connected with him by consanguinity. It may be admitted, that those were among the objects to be effected by that statute. But it is not perceived, how those objects can impart to the act the sense imputed to it. It is true, it was intended to produce subsequent certainty in the law of descents; and to a great extent it has eminently succeeded. But the court cannot go further than the act itself has done in establishing such certainty or uniformity. The enactment here, for example, is, that an inheritance, which *has* descended (no matter when) *shall* descend to the blood of the ancestor, from whom it did descend. Now, an estate, once descended, remains always in the party as a descended estate, except only in the cases at common law of the subsequent birth of a preferable heir, as mentioned in *Cutlar* v. *Cutlar*, 2 Hawks, 324, and which have no application here. When, therefore, one dies since 1808, we must, in order to know whether his estate was in fact transmitted by descent from a former owner, enquire whether the *propositus* was in law the heir of that former
(590) owner. It is referred to the law, existing at the time of the descent cast, to pronounce, who was heir, and as such took the estate. It is an event past, and in the nature of things it cannot be altered. Nor does the act of 1808 affect to interfere with the operation of the previous law (uncertain as it was) on past cases. It declares how estates, which *have* descended, *shall* descend; but it does not attempt to annul previous descents, by saying that what was a descent under the acts of '84 should not then be so considered, nor that a person, who was not heir before 1808, should, nevertheless, be afterwards considered to have been the heir before. The act of 1808, therefore, by making land, which had descended, one of the subjects on which it was to operate, necessarily treats all descents, which had occurred, as proper and effectual.

Precisely the same principles apply in ascertaining who would have been the heir, if the ancestor had died at a particular time, that do in ascertaining who was the heir upon a death which did not occur at that time.

But reliance was placed at the bar on the use of the terms, "the heir or one of the heirs," as denoting that the act does not apply to descents before 1784, since at common law there could be no plurality of heirs; and it was thence inferred that those after 1784 were upon the same footing. If that meaning could be imputed to those terms, yet it would be the duty of the court to treat their introduction as a mere inaccuracy of language, sub-

ject to the control of other plain and unequivocal parts of the Statute. But, in truth, there is no inaccuracy whatsoever in the use of that language; and it is critically correct, to express what was meant, and to embrace every case of a descent at common law or under the acts of '84 and '95. The expression applies with propriety to two different states of the law, in one of which there could be but one heir, and in the other there might be more. And it applies with equal propriety to cases, in which, by law, there may be a plurality of heirs, and yet, in point of fact, there is in one case but one heir, while in another there are several. The meaning in this Statute very evidently is, that if the inheritance was given to one, who would
(591) have been the single heir of the common law; or if it was given to one as the only existing heir under the act of '84, or as one of several existing heirs under that Statute: in either of those cases the land so given shall descend from the donee to his relations of the blood of the donor.

It is true, also, that in respect to descents to the two lines, paternal and maternal, the policy of the act is perfectly apparent to keep the estate in that line through which it came to the *propositus*. Indeed, the act goes in this respect far beyond the common law, which applied this principle only to descended estates; whereas the act embraces likewise devises, gifts, and settlements on heirs apparent and presumptive. Yet the court cannot carry this policy further than the Legislature itself has done, nor embrace cases which the words of the act, as expressed, cannot be made to cover. Attempts to escape from this rule of construction were made by stating, hypothetically, cases, in which the operation of the act is supposed to be unreasonable and incongruous. For example, it was said, the Legislature could not mean to make a difference between children, advanced at any time—much less, between a second son advanced before '84 and the same son advanced afterwards. It would be presumption to undertake to say, how the Legislature would have provided for those particular cases, if they had occurred to them. But the Legislature did not undertake to provide for particular cases. The experience under the acts of '84 had proved the peril of such an attempt. This act regulates descents by general rules; and the rule, as to this point is, that estates which descend from the owner to his heir or which he gives to one who would have been an heir, shall descend to his blood. Whether the donee be a child or not, is not the criterion; but whether he be heir apparent or heir presumptive. It is true, that if between '84

and '95 a father devised land to sons and daughters, that given to the former would descend to the heir of the blood of the father; while that given to the daughters would go to all the relations in equal degree. Why? Because the act does not say "*a child* advanced" but *an heir* advanced; and at that
(592) time sons were heirs and daughters were not. For a like reason it is also true, that if before '84 one settled land on a collateral heir presumptive, and afterwards married and had children and then settled other land upon a second son, or, before '95, on a daughter, the first would descend to the blood of the settling ancestor, while the last would be a first purchase and go to all the heirs, on both sides. But, on the other hand, it is to be observed, that upon the defendant's construction, the land settled on the collateral, in this case, would not now descend to the line of the settling ancestor, unless indeed, we read the act as if its words, instead of being "*would have been* the heir or one of the heirs in the event of such ancestor's death," were "to whom the person thus advanced was *a relation* and might by possibility become the heir or one of the heirs;" a liberty which no court could arrogate to itself. Further, upon the defendant's construction every settlement at this day on a collateral heir presumptive would be turned into a general purchase and go to all the heirs, if the settling ancestor should afterwards marry and have issue, or would fluctuate between being a descended or purchased estate, with the birth and death of the issue of the settler. That certainly could not be the meaning of the Legislature; and in the case supposed, the land given to the collateral, when he was heir presumptive, and any given to the subsequent born issue, being heir apparent, would both descend, as the settler would wish, namely, to his blood. But we do not pursue this part of the subject further, as we have already said the statute lays down general rules to regulate descents, and that they are not to be controlled by a supposed want of symmetry in their application to different particular cases, not specified and not intended to be specified in the act.

PER CURIAM. Judgment affirmed.

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(593) JAMES W. Y. WALTON *vs.* JOHN TOMLIN, WILLIAM P. WAUGH & JAMES HARPER.

1. In an action on a contract, a defendant cannot be admitted as a witness for his co-defendants, even after he has suffered judgment by default to be taken against himself.

2. When a copartnership is dissolved, notice of the dissolution should be given to those, who were in the habit of dealing with the firm, and to others, either by advertisement in a public gazette or otherwise.

This was an appeal from the judgment of the Superior Court of Law of Ashe County at Spring Term, 1841, his Honor Judge MANLY presiding. The case appeared to be this: It was an action of debt, upon a promissory note, dated the 21st of Nov., 1835, signed "John Tomlin & Co." It was proved that a commercial copartnership, under this name and style, between John Tomlin, William P. Waugh and James Harper, existed in Ashe County for some years; and was transacting business as late as the summer of 1835. At what time it was dissolved did not distinctly appear. A witness stated that *his impression was* that a dissolution took place in the month of September, 1835. It was also proved that *John Tomlin* was the active partner in the said concern—that he made all the purchases and attended to the sales—and that the signature "John Tomlin & Co." was in his handwriting. It did not appear that any notice of the dissolution was ever given in any gazette or otherwise. A witness also proved that the plaintiffs had enquired of him, previous to the making of the note, whether Waugh and Harper were members of the firm of "John Tomlin & Co.," to which he answered they were understood to be; and further proved that he, the
(594) witness, had been repeatedly enquired of *before* and *once since*, the date of the note, by the plaintiffs, as to the standing of the members of the said firm. The defendants exhibited in evidence articles of co-partnership between John Tomlin and John Hardin. It did not appear that this firm ever transacted any business, nor was it known to exist in the neighborhood, which the articles pointed out for its location. The goods, for which the note sued upon was given, were packed in Charleston, directed to John Tomlin & Co. and conveyed into Ashe County.

When the jury were called and about to be empanneled, the counsel for the defendants offered that John Tomlin should confess a judgment in the action, for the full amount of the principal, interest and costs. This the court refused to allow. In the progress of the trial, the defendant Tomlin was offered as a witness by the other defendants to prove, that he told the plaintiffs, at the time of giving the note, that the old firm of "John Tomlin & Co." was dissolved, and that a new one of the same name and style, but composed of John Tomlin and John Hardin, had been formed. The court deemed the witness incompetent

and he was excluded. The presiding Judge instructed the jury, that the law implied a power in any member of a firm, associated generally for transacting mercantile business, to sign notes in the name of the association for the purchase of goods, and if the jury found, upon a consideration of the facts, that the defendants were thus associated at the time of the execution of the note, that the plaintiffs knew the firm so formed and none other of the same name, and gave the credit to the defendants; then they should find a verdict for the plaintiffs. If there had been a dissolution of the firm, and Waugh and Harper had withdrawn from it, at the time of the execution of the note; then it was the duty of the defendants to give notice to such as were in the habit of dealing with their firm that they had withdrawn, and to all others by advertisement in some gazette or otherwise. And that if the necessary notice had not been given, and the jury should find further that the plaintiffs had no knowledge of the fact in any way, but trusted the defendants, they would still be liable and the jury should so find. But if they found
(595) that the necessary notice had been given, or if the plaintiffs had knowledge of the dissolution at the execution of the note, they would find for the defendant. Or if the jury believed that the plaintiff, when he took the note, had knowledge of the firm, composed of Tomlin and Hardin, and trusted that concern, or, having such knowledge, took without enquiry the note of that concern, they should find for the defendants. The counsel for the defendants asked the Judge to instruct the jury, that, if they believed that Tomlin *intended* to give the note of the firm, composed of Tomlin and Hardin, they should find for the defendants; which the Judge refused. The counsel further objected that the plaintiff had misconceived his action; that it should have been assumpsit for the goods, and on that account he could not recover; and asked his Honor so to charge, which was also refused. There being a verdict and judgment for the plaintiff, the defendants appealed.

No counsel for the plaintiff in this court.

Boyden for the defendants, contended that Tomlin was a competent witness for the other defendants, and cited 3 Stark. Ev., part 4, 106 and 166; *Ward* v. *Hayden*, 2 Esp. Ca., 552; 2 Camp., 334, and that Tomlin was not interested in behalf of the defendants, as it was his interest to make them equally liable with himself.

GASTON, J. It is an undoubted general rule of evidence, that a party to the record is not to be permitted to give evidence in the case. So far as exceptions to this rule have been established, they must be followed; but it is dangerous to introduce new exceptions, because of their evident tendency to break down the rule itself. We find no such exception established as that here contended for by the defendants. There are *Nisi Prius* cases, in which a defendant in an action of *tort*, who has suffered judgment to go by default, has been admitted a witness for the other defendants to prove them not guilty. *Ward* v. *Hayden*, 2 Esp. Cas., 552. Case before Baron Wood, cited 2 Camp. (note) 333.

Whether these have established the exception in cases
(596) of *tort*, is a question, which will be worthy of consideration, when the determination of it becomes necessary. But no case has yet held, that, in an action upon an alleged contract, a defendant, who has suffered a default, is an admissible witness for the defendants, who deny the contract. Independently of the general rule that excludes such a witness as a party on the record, there seems to us a ground of interest, on which he ought to be excluded. Though offered for the purpose of disproving the liability of the other defendants, and though with us there may be a judgment against one and for others of alleged joint contractors, yet, when sworn, he is received to testify to the whole matter embraced in the issue. Under the general issue of *non assumpsit* or *nil debet*, it may be shewn, that the debt or demand has been released, or paid, either in whole or in part. The witness has an interest in establishing such a defence, for, although he has entered no plea, he must have the benefit of a verdict, diminishing the amount of the debt or demand claimed as a joint debt or demand of all the defendants.

The application made to the court, when the jury was about to be empannelled, to permit the defendant, who had not pleaded, to confess a judgment, was addressed to its sound discretion, and we have not the authority to supervise the exercise of that discretion. No objection has been taken to the instructions of the Judge, and no error is seen in them. The judgment must therefore be affirmed.

PER CURIAM. Judgment affirmed.

(597) STATE OF NORTH CAROLINA *ex relatione* ISAAC B. BRADDY *vs.* GERALDUS SHIRLEY AND OTHERS.

1. A constable's bond, made payable to the State of North Carolina, taken by a person not authorized by law to take it, is void for want of delivery.
2. There may be cases, where a bond payable to the State, though taken by an unauthorized person, if it be for the benefit of the State itself in its corporate capacity, may be good; but it cannot be so when made payable to the State, as a trustee for others, unless taken by the persons specially prescribed by some act of the Legislature.
3. The will of the State is only to be known, when declared through those appointed to declare it.
4. The case of *Grist* v. *Backhouse*, 4 Dev. & Bat., 362, cited and approved.

This was an action of debt, tried at the Fall Term, 1840, of Edgecomb Superior Court of Law, before his Honor Judge HALL. The action was brought upon the following bond:

STATE OF NORTH CAROLINA, } ss.
Edgecomb County: }

Know all men by these presents that we, Geraldus Shirley, Charles G. Hunter and David Barlow are held and firmly bound unto the State of North Carolina in the sum of four thousand dollars, to which payment well and truly to be made, we bind ourselves and our heirs, jointly and severally, firmly by these presents. Sealed with our seals and dated this 1st day of March, 1836.

The condition of the above obligation is such, that whereas the above bounden Geraldus Shirley has been appointed constable of the County of Edgecomb in the year 1836, now, if the said Shirley shall well and faithfully execute the said office of constable by executing all warrants put into his hands (598) and shall faithfully pay over to those entitled, all sums of money collected by him, by suit or otherwise, according to the acts of Assembly in such cases made and provided, then the above obligation to be null and void—otherwise to remain in full force and virtue.

GER. SHIRLEY, [Seal.]
CHAS. G. HUNTER, [Seal.]
DAVID BARLOW, [Seal.]

Signed, sealed and delivered in the presence of witness,
H. AUSTIN, J. P.

Upon the trial its execution by the defendants was proved. It appeared that the defendant Shirley had been appointed constable by Henry Austin, a justice of the peace of the County of Edgecomb, and thereupon executed the bond with the other

defendants as his sureties. This appointment was made by Austin alone and out of court. The relator upon the trial proved, that he had placed in the hands of the defendant Shirley, as constable, during the year for which he was appointed constable as aforesaid, sundry claims, some of which claims he had collected and failed to pay over, and others he might have collected, if due diligence had been used. He also proved a demand on the constable before bringing this suit. It also appeared that the bond was deposited by Austin in the office of the County Court Clerk, with the other constables' bonds, where it remained till the bringing of this suit. The defendants' counsel upon the trial insisted that the bond was a nullity, and that no action could be maintained upon it, and requested the court to so instruct the jury. The court informed the jury that in law the bond was not a nullity, but that an action might be maintained on it, provided they were satisfied that the defendant Shirley had failed to pay over the moneys collected by him on demand, or had been guilty of neglect in not collecting. The jury returned a verdict for the plaintiff. A motion for a new trial was made by the defendants, on the ground of misdirection by the court, and refused. Judgment being rendered for the plaintiff, the defendants appealed.

(599) After an argument of this case at December Term, 1840, the court intimated a doubt whether the bond was not void for want of delivery. And the case was again argued at this term by *S. Whitaker* for the defendants and *B. F. Moore* for the plaintiff. The reporter regrets that he has no notes of the arguments of the defendants' counsel.

B. F. Moore for the plaintiff.

1st. As to the point of delivery, the case affirms that the bond was "executed." The only point presented below was that the appointment of Shirley being contrary to law, was contrary to public policy and therefore the bond was void and this is the only point, that can be presented here, without making nonsense of the case as stated.

2dly. The parties *intended* to deliver the instrument as their bond, and it is conceded that if the bond were payable to an individual, the facts attending the execution would have constituted a complete delivery. This is well established. 4 Kent's Com., 454 and note; *Doe* v. *Knight*, 12 Eng. C. L. R., 351; *Sanbervye* v. *Arden*, 1 John Ch. R., 240.

3rd. Bonds intended to be executed as official bonds, and void as such, because they do not conform to the statute requiring

them, are good as voluntary bonds and well delivered. *Branch* v. *Elliott*, 3 Dev., 86; *Vanhook* v. *Barnet*, 4 Dev., 268; *Threadgill* v. *Jennings*, 3 Dev., 384. The rule is that if a bond be delivered to a stranger, the law presumes the assent of the obligee, till actual refusal. *Butler and Baker's case*, 3 Rep., 28; *Whelpdale's case*, 5 Rep., 119; *Threadgill* v. *Jennings*, *ut supra* (RUFFIN'S opinion.)

4thly. This rule is not altered when the bond is payable to the Sovereign. The State is a moral person, with all the attributes of such a being. Vattel's Law of Nations, Kent's Com. The State is a great corporation, per MARSHALL, C. J., in *United States* v. *Maurice & al.*, 4 Brock Rep. The sovereign has capacity to take bonds, independently of any authority conferred by statute, and through agents not delegated by law for that purpose. *U. States* v. *Bradley*, 10 Peters' Rep.; *U. States* v. *Tingey*, 5 Peters' Rep., 115. A bond payable to the sover-

(600) eign, when by statute it is directed to be made payable to an individual, is good as a voluntary bond. 2 Hen. & Mum., 459; *Winslow and others* v. *Commonwealth*, 3 Wash. Cir. Co. Rep., 10; *U. States* v. *Morgan*, Cox's Digest, 110. In such a bond, the sovereign may stand as trustee for all injured. *Bibb* v. *Cawthorne*, 1 Wash. Rep., 91, explained in Hen. & Mum., *ut supra*, ROANE'S opinion.

5th. The second point of the defence cannot be heard under the general issue. 1 Not. & McCard's Rep., 554. Bonds contrary to statute must be avoided by special plea. 1 Chit. Plead., 479 and 480.

6th. The appointment may even be unconstitutional and yet the bond is good—they are different things. *U. States* v. *Maurice*, is decisive of this point.

7th. It degrades the sovereign to suppose that it assents to bonds of persons illegally appointed to office, in order to secure itself, and yet it will not assent to bonds to relieve its citizens. The same policy which may forbid assent to the latter, excludes the idea of assent to the former.

8th. Any one may, by bond, become indebted to the sovereign, either absolutely or conditionally. If any of the conditions are illegal, they may be rejected and the others stand good. The breaches assigned in this case only charge the obligor as a simple collector and not as an officer. The bond is good to compel the payment of money, which is covered by the condition and which is detained against morals and law. *U. States* v. *Maurice & al.*, *ut supra*.

GASTON, J. This was an action of debt brought by, or in the name of, the State of North Carolina, upon the relation and to the use of Isaac B. Braddy against Geraldus Shirley, Charles G. Hunter and David Barlow. The declaration averred that the defendants, by their writing obligatory, sealed with their seals and dated on the 1st day of March, 1836, acknowledged themselves to be held and bound unto the said State in the sum of $4,000, with a condition under written, that if the above bounden Geraldus, who had been appointed constable of the county of Edgcomb for the year 1836, should well and faithfully execute his said office of constable by executing all warrants put (601) into his hands, and should faithfully pay over all moneys collected by him, the said Geraldus, by suit or otherwise, according to the acts of Assembly in such case made and provided, then the above obligation to be void; and the declaration set forth that the said Geraldus had not complied with the condition aforesaid, but had broken the same in this, that he had in the said year 1836 collected the amount of a certain promissory note, which the relator had put into his hands, as constable, and had refused to pay over the same to the relator upon demand therefor made, and also in this, that on the 10th of April, 1836, the relator had put into his hands, as constable as aforesaid, a certain other promissory note, which he had failed to collect, and which with due diligence he might have collected. The defendants craved Oyer of the alleged obligation and condition, and, this being had, pleaded the general issue, conditions performed and not broken. Upon the trial the plaintiff exhibited the alleged writing obligatory, and gave in evidence, that on the 1st of March, 1836, Henry Austin, Esquire, one of the justices of the Court of Pleas and Quarter Sessions of Edgcomb county, appointed the defendant Shirley constable of said county for the year 1836; that this appointment was made out of court; that, thereupon, the defendant subscribed, sealed and delivered to the said Austin the writing aforesaid as their deed; that the same was received by the said Austin, and by him deposited with the clerk of the County Court for safe keeping, where it remained until the institution of this suit; and further offered evidence to establish the breaches assigned in the declaration. The counsel for the defendants prayed the court to instruct the jury, that the (alleged) bond was a nullity, and an action could not be maintained upon it; but the court, rejecting this prayer, instructed the jury that in law the bond was not a nullity, and

that an action might be maintained upon it, if they were satisfied that the defendant Shirley had failed on demand to pay over the money collected for Braddy, or had been guilty of negligence in not collecting it. The jury found a general verdict for the plaintiff on all the issues, and assessed his damages by reason of the breaches of the condition, to $222.82. A new trial was
(602) moved for by the defendants, but refused, and judgment having been rendered for the plaintiff, the defendants appealed.

By the act of 1833, ch. 5, (Revised Stat., ch. 24,) it is directed that, in every county in the State, constables shall be elected, one in each captain's district, by the inhabitants thereof, that returns of elections shall be made to the Court of Pleas and Quarter Sessions of each county; and that said court shall cause the constables elected to take the oaths of office in court, and take bonds from them with sufficient sureties, payable to the State of N. Carolina, and conditioned for the faithful discharge of their duties. The act also provides, that when an election shall not be made by the inhabitants of a district, and where a vacancy may occur in the office of a constable by death or removal out of the county, the court, seven justices being present, shall have power to appoint a constable; and it authorises suit to be brought upon bonds so taken in the name of the State, upon the relation and for the use of any person, who may be injured by the breach thereof. Under this act it cannot be questioned but that the appointment of the defendant Shirley as constable was utterly null, and that the magistrate, who received the bond of the defendants, had no authority as such to accept it. But it had been provided by an old act of 1741, ch. 24, that upon the death or removal of any constable out of the district for which he was appointed, it should be lawful for the justices of the County Court in which such district should be, or any of them, to appoint and swear another person to be constable in the room and stead of the constable dead or so removing, who should act until the next County Court; and a doubt has been expressed whether this provision was abrogated or repealed by the act of 1833. The enquiry does not appear to us a material one, as respects the case before us, because the magistrate did not make an appointment until the next County Court, but undertook to make an appointment for the year 1836; and if this provision had been in force, the appointment made and the proceedings upon it would have been liable to the same objection,

because of an excess of authority, as, supposing the
(603) provision not in force, they are exposed to because of
want of authority. But we are satisfied that the provision in the act of 1741, was repealed by the act of 1833, because the latter contains an enactment, covering the whole ground of this provision, and making a different disposition in relation to the subject matter of it.

The question of law presented by the case is, has there been a delivery of this alleged bond? If there has not been, the instrument declared on was not the deed of the defendants. There has not been a delivery, unless the instrument has been accepted by some authorised agent of the State, or unless in law its acceptance can be presumed.

The State has undoubted capacity to receive a conveyance or an obligation; and this capacity can only be exerted through the medium of authorised agents. The authority, however, of these agents may either be expressly conferred, or may be incidental to other powers, and therefore comprehended within them. The cases of *Dugan* v. *United States*, 3 Whea., 172, and *U. States* v. *Tingey*, 5 Peters, 175, which have been cited for the plaintiff, do not establish this doctrine; and upon principle as well as authority, we have no hesitation in recognising it thoroughly. But the magistrate who received this bond in behalf of the State acted wholly without authority. He not only had no express delegation of power to take it, but he was acting altogether *without his official sphere* in relation to the subject matter. His acceptance of the instrument imparted to it no more validity, than it would have received from the acceptance of any, the humblest, individual in the land. It is of the very essence of regulated liberty, that the moment one entrusted with authority steps beyond its limits, his acts become the acts of a citizen, and are not those of a public agent.

The want of a precedent authority may, however, be supplied by a subsequent ratification. But none such is shewn in this case. The clerk of the County Court is entrusted with the keeping of the records of the court and other public documents; but he cannot make an instrument a record or public document, which is not such, by placing it with the files among the records
of his office. The suit is brought in the name of the
(604) State of North Carolina, but that name is used by an
individual, as a relator, for his own benefit, upon the supposition that this instrument has been taken under the public authority; and, whether it was so taken or not, is the very ques-

tion to be tried. But if the action has not been brought at the instance of a relator—if it had been instituted by the State through the Attorney General—unless it was shewn that *he* had authority to ratify the act of the individual, who, without authority, took the instrument as a bond—*this* would not have been a ratification by the State. The will of the State is only to be known, when declared through those appointed to declare it.

The remaining enquiry is, does the law presume an acceptance? The delivery of a deed to the third person for the use of a grantee is generally held to be a delivery to the grantee, until he express his dissent. This rule is founded upon the presumption that men do not refuse benefits, and therefore the law infers an acceptance without requiring proof thereof. How far this rule is applicable to bodies politic—and especially to those of the highest dignity, States and sovereignties—which act only through the medium of others, and these ordinarily invested with special powers and required to act under these powers with prescribed formalities—on principle at least is not so clear. In the case of the *Bank of the United States* v. *Dandrige and others* (12 Wheaton, 64) Chief Justice MARSHALL held that an instrument purporting to be a bond, given by a cashier and his sureties for the faithful performance of his duties to the institution, notwithstanding evidence that upon the execution of this instrument he was introduced into the bank as cashier and acted as such afterwards, and that this instrument was deposited among the muniments of the bank, as the cashier's official bond—was not the deed of the defendants, because not accepted by a formal resolution of the directors. His brethren or a majority of his brethren on the Supreme Court Bench dissented from this opinion, holding that the rule of presuming assent to benefits tendered applied to corporations as well as to individuals, or at all events that their assent might be inferred from evidence short of that which would be required to bind them to onerous obligations. There are also decisions of courts of great respec-
(605) tability, in which, without evidence of formal acceptance, obligations made directly to a State, or to the United States, for the payment of money or the performance of other duties due to them in their corporate capacity, have been upheld as bonds on the ground of presumed acceptance. Among these, one of the strongest is that in the case of *the United States* v. *Maurice and others*, 2 Brock, 96, in which Chief Justice MARSHALL, reluctant as he avowedly was to give in to any laxity or

principle, because of apprehended inconvenience, held an instrument executed by one, irregularly appointed to office, for securing the faithful collection and disbursement of public moneys, binding on the officer and his sureties. It would *seem*, therefore, that there are contracts and engagements so plainly and unequivocally beneficial to the State, that the law will not, in regard to them, require evidence of formal acceptance; but it is manifest that in the application of this rather latitudinous doctrine, it is incumbent on the courts to exercise great caution, lest they should unwittingly take upon themselves a function confided by the fundamental law to a different part of the government, the function of determining what is and what is not for the good of the State.

The present case does not call upon us to draw this line of partition. The instrument before us does not profess to be made for the benefit of the State *as such*. It is avowedly made to secure the interests of all persons, who shall entrust the defendant Shirley with the collection of debts, and made to the State as a trustee for these persons. True, the State may be said in common parlance to have an interest in the faithful performance of these duties, because the performance of them is for the advancement of right. But the State has not an interest therein in its proper character, *as a State*. If individuals may, without permission, thus make the State their trustee, what limit can be set on the exercise of this liberty? Why may not every one—every firm—every voluntary association—every corporate body—nay, every foreign State—should they choose—take engagements for the protection of their interests in the name of the State? If this be done, is it not manifest that the State
(606) may become involved in responsibilities and duties, wholly alien from the legitimate purposes of government, and its honored name may be bandied about in the contests of private litigants, like the John Doe and Richard Roe in an action of ejectment? But there is a yet stronger objection to the presuming of an acceptance of this instrument by the State. By its constitutional organ, the Legislature, the State has declared when and through whose agency it will accept a trust of this character—who may take, and in what cases they may take a bond as payable and so conditioned as is the instrument now under consideration. This expression of the public will must be understood by us, whose duty it is to give it full effect as a denial of the power, thus specially delegated, to all other persons and in all other cases. Against this denial no presumption can be entertained.

It has been insisted, in argument for the plaintiff, that the precise ground on which we put our decision was not taken on the trial—that the objection made by the defendants was not to the incomplete execution of the instrument, but to its validity, supposing it executed. There is some foundation for this criticism—the point is not made as distinctly, as it might have been presented. But nevertheless it manifests itself upon the case and cannot be overlooked. Objection was taken to the bond as such *upon the general issue*—because of the circumstances under which the alleged execution took place—and the defendants prayed of the court to instruct the jury to find upon this issue that it was not their deed. But instead of granting this prayer, the court instructed the jury, that upon the evidence offered the plaintiff had maintained the issue on his part and was entitled to recover. If in *this* there was error, we are bound to reverse the judgment. *Grist* v. *Backhouse*, 4 Dev. & Bat., 362.

It is not for us to say or intimate, whether the relator has any remedy in any other court or in any other form. But it is our opinion that as the facts appear in this record there cannot be a judgment at law upon this instrument, as the bond of the defendants.

PER CURIAM. Judgment reversed and a *venire de novo* awarded.

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(607) JOHN McC. BOYLE *vs.* CHARLES REEDER.

1. In an action of covenant, for not furnishing machinery for a steam mill at the stipulated time, the plaintiff cannot recover in damages the estimated value of the *profits* he might have made, if the covenant had been complied with. These are too vague and uncertain to form any criterion of damages.
2. The damages should be given upon the principle of a reasonable rent and insurance for the buildings, and the actual loss by decay, &c., of the materials, during the period he was prevented from commencing his operations by reason of the default of the defendant in not complying with his covenant.
3. He can only recover damages really sustained by him, and not such as it seems possible he may have sustained.

This was an action of covenant, tried at the Spring Term, 1841, of Bertie Superior Court, before his Honor Judge NASH. A copy of the covenant declared on, so far as it is material to this case, is annexed. The plaintiff alleged the following breaches: 1st. That the engine was not finished and ready for shipment at the port of Baltimore on the 1st of March, 1837;

2dly. That the engine was not put up by the 1st of May, 1837; 3dly. That the engine was not made of good materials, nor in a workmanlike manner; 4thly. That it had but one shaft, and a single instead of a double crank; 5thly. That it had not power sufficient to drive twenty-four saws. It was admitted that the engine was not ready for shipment at the port of Baltimore on the 1st of March, and that it was not put up by the 1st of May. It was further admitted that the plaintiff had not paid the whole of the purchase money, but that $ were still due and unpaid, for which the present defendant had brought an action in Washington Superior Court on the counter part of this agreement executed by the present plaintiff, and bearing even date with it, and that the action was now pending in said court—that plaintiff was not in Baltimore on the 1st of March to receive
(608) the engine, nor did he pay the $1,000 on the 1st of February, but that this payment was made on the day of , in the year 1837, and the further sum of $ on the day of October, 1837. The plaintiff's witnesses proved that the building for the reception of the engine was not erected until after the 1st of May, 1837. The defendant commenced putting up the engine late in December, 1837, and completed it about the 8th of January, 1838, when the plaintiff received it. And it was proved that very soon thereafter, the fly-wheel broke, as did the gate-head and the rock shaft; and that the two former were honeycombed, and the hollow places in the gate-head were filled in with lead. On the part of the defendant it was contended and evidence introduced to prove, that the engine was manufactured out of good materials and the work executed in a workmanlike manner—that the breaking of the fly-wheel was owing to the insufficiency of the foundation of the mill-machinery, which, it was admitted, it was the duty of the plaintiff to build, and the nature of the ground not affording a firm foundation, being over a quicksand—that the breaking of the gate-head and of the rock-shaft was occasioned by the want of skill in the engineer, employed by the plaintiff to manage the engine. There was contradictory evidence as to the crank. The plaintiff then gave evidence to shew that he had collected timber to the value of $2,000 ready to saw by the 1st of May, 1837, and that by the 8th of January, 1838, when the mill was set in motion, he had collected between $7,000 and $9,000 worth—and claimed that he was entitled to recover from the defendant the injury, which the timber had sustained by lying in the water so long. Some of the witnesses stated that the timber, by lying in

the water 12 months would be injured 20 per cent.—others, that it would not be injured at all, but would be benefited thereby. No evidence, however, was laid before the jury to shew that the timber of the plaintiff was in the least injured. The plaintiff further claimed to recover of the defendant in damages the profit, which he would have made by his mill between the 1st of May, 1837, and the day of May, 1838, when the works were repaired and she finally put in motion. This latter
(609) evidence the court rejected. He further claimed in damages the hire of his hands, while the works were repairing. To rebut this claim, the defendant shewed that during those times, his hands were employed in getting timber, which was as profitable to him as working the mill. It was further admitted that the whole of the engine delivered by the defendant to the plaintiff, with the exception of the fly-wheel and rock-shaft, were still in his possession and used by him in working his saw-mill, The plaintiff further proved that the engine had not power to carry twenty four saws, and that to make it do so it was necessary to add another boiler, which he did. There was contradictory evidence as to the power of the engine. When the plaintiff closed his testimony, the defendant's counsel moved the court that he might be called upon the ground, 1st, that he had not shewn that he had paid the whole of the purchase money before bringing his action; 2dly, because he had not shewn that he was in Baltimore on the 1st of March, 1837, ready to receive the engine and pay the money then due. This motion the court refused; and in its charge instructed the jury that this contract contained covenants of different kinds—the first on the part of the defendant was an independent one, for a breach of which the plaintiff was entitled to recover damages, unless they were satisfied by the evidence, that the time had not been enlarged by the parties, in which case performance by the defendant within the enlarged time would be a full answer to the claim of damages by the plaintiff for that breach—that the second covenant on the part of the defendant was dependent on a condition, to be previously performed by the plaintiff, to-wit, the erection of the building to receive the engine by the first of May, which the plaintiff had shewn was not done, and he was not therefore entitled to any damages for that breach, if they were satisfied the fact was so—that, if, from the evidence, they were satisfied that the engine was made of good materials and in a workmanlike manner, and that the breaking of the parts mentioned was occasioned by no insufficiency of the work

or materials, but by the insufficiency of the foundation of the mill-machinery or the unskillfulness of the engineer
(610) employed by the plaintiff, in that case the plaintiff would not be entitled to any damage on the third alleged breach; but that he would be entitled to such damages, if they were of the opinion that the materials of the engine were not good or the work not executed in a workmanlike manner—that, according to the contract, the defendant had covenanted that the engine should be of sufficient power to carry twenty four saws, and, that although it had the number of boilers specified in the contract and they were of the dimensions there called for, yet the contract on the part of the defendant was broken in this particular, if they were not sufficient to carry the twenty four saws, and if it was necessary to add a fifth boiler to give to the engine that power, the plaintiff had a right to do so, as it was proved he had done in this case, and recover of the defendant what it cost him. The court further instructed the jury that, as the plaintiff had received and kept the engine, and was now using it, with the exception of the fly-wheel and rock-shaft, the measure of damages, to which he was entitled for the insufficiency of the engine, as to the materials and workmanship and power, was what it would or had cost the plaintiff to make it what the defendant contracted it should be—that they would decide whether the crank was a single or double one, and so of the shaft—that as to the timber, if they were satisfied that it had been actually injured, by remaining in the water, they would give the plaintiff damages for such injury, confining their enquiry to the timber gotten up to the 1st of May, 1837, and that the plaintiff was entitled to damages for his hands being out of employment at the mill, during the time the repairs were making, if they were satisfied they had suffered damages.

Copy of the Agreement referred to, so far as it is Material.

Memorandum of an agreement entered into this 20th day of December, 1836, between Charles Reeder of the City of Baltimore, of the one part, and John McC. Boyle of the town of Plymouth, North Carolina, of the other part, witnesseth as follows: The said Charles Reeder for the consideration
(611) hereinafter mentioned hath agreed to and with the said John McC. Boyle, his executors &c. to make and furnish for him a steam engine and boilers on the high pressure principle. The cylinder to be &c. (describing it)—to have four iron boilers, 26 inches in diameter and 24 feet long, with furnace,

bars &c. The cylinder to lie horizontal and connected to a double crank with a shaft on each side, with fly-wheel &c.—in all to be done and finished in a workmanlike manner and of sufficient strength and dimensions to drive four gangs of saws (two on each side,) each gang to hold six saws, making in all twenty-four saws, to saw pine lumber; to be made and in readiness for shipment from the port of Baltimore on or about the first day of March, 1837; then to be put ready for operation in a building provided for that purpose in Plymouth, North Carolina, by said John McC. Boyle on or before the 1st day of May next (1837.) He, the said John McC. Boyle, his ex'rs, &c. doth covenant and agree to pay the said Charles Reeder for the aforesaid engine &c. thirty seven hundred dollars in current money in the City of Baltimore as follows, viz. $1,000 on the 1st day of February, 1837, $800 as soon as the engine is ready to ship, $1,000 as soon as the work is put up ready for operation, and the balance in 90 days after the engine is first put into proper operation. The said John McC. Boyle for himself &c. furthermore covenants and agrees to furnish at his expense boarding and lodging for the workmen, while putting up the said engine and boilers, and also all necessary brickwork for setting up the same and yellow pine sills for placing the engine on, as well as the freight of the said engine and boilers &c. from the City of Baltimore to the town of Plymouth, or the place where the said engine and boilers are to be erected and put into operation; and also a sufficient number of laborers to assist in putting the engine, boilers &c. in their proper situation. (Then followed a covenant for furnishing other materials not embraced in this suit.)

Counterparts of this covenant were signed and sealed by the parties.

(612) The jury found a verdict for the plaintiff under the charge of the court, for one thousand dollars. The plaintiff moved for a new trial, on the ground of misdirection of the judge as to the question of damages, and his rejection of proper evidence; which motion was refused; and, judgment being rendered according to the verdict, the plaintiff appealed to the Supreme Court..

A. Moore, for plaintiff, appellant, contended that the plaintiff had a right to estimate his damages, in consequence of the delay occasioned by the breach of covenant on the part of the defendant, by the profits the mill would have made, from the time that covenant ought to have been performed to the time when it was actually performed; and cited on this point, 3 Peter's Cond.

Rep., 621; *Richardson* v. *Meilish*, 9th Com. Law Rep., 391; *Ward* v. *Smith*, 11th Price, 19. He also insisted that as to the damages to the timber, the judge improperly restricted the jury to damages before the 1st of May—that the erection of the house and the furnishing of the machine were independent covenants, and the defendant should have shewn his machine was ready by the 1st of May. 7 Petersdorf, 105.

Kinney, for the defendant, contended that the money to be paid the 1st of February was a condition precedent—also that the shipping of the engine on the 1st of March, and the payment of $800 as soon as the engine was ready to be shipped, were mutual and dependent covenants, and each should have been ready to perform before an action accrued. Platt on Cov., 70 (3 Law Lib.); *Portage* v. *Cole*, 1 Saunders' Rep., 320; *Terry* v. *Duntz*, H. Black., (cited in Platt on Covts.); *Pennington* v. *Monell*, 11 Johns. Rep., 203. He also insisted, that, in giving damages, the expected profits should not be a rule, as the profits were merely contingent and uncertain, and could not be estimated.

RUFFIN, C. J. The court does not perceive any cause of complaint on the part of the appellant with the instructions to the jury. His Honor held, that the plaintiff was
(613) entitled to recover damages on the covenant of the defendant to furnish an engine, ready for shipment on the first day of March, 1837, unless the plaintiff had himself enlarged the time; and also damages for the inefficiency of the work, whether arising from the badness of the materials or workmanship, or because it did not correspond in form and parts with the contract. Those instructions embraced every breach alleged by the plaintiff, except that which respected the failure of the defendant to put up the engine on or before the 1st of May, 1837. Upon this last it is clear, the plaintiff could not recover upon his declaration and evidence. For the contract requires the plaintiff to have the necessary building erected, in which the engine was to be placed. The erection of the building must necessarily precede the putting the engine in it; and it was therefore incumbent on the plaintiff to show that the house was ready. That he did not do; but on the contrary, he admits it was not ready by the first of May; and, indeed, it does not appear to have been built one day before the defendant had the engine at Plymouth, to be put therein. The only remaining question is as to the proper measure of damages. We think that as far as the instructions were specific on that subject, they

are entirely correct; that in no respect were improper instructions given; and that, if the plaintiff was not satisfied that all the directions had been given to the jury which he wished, and in the form he wished, he ought to have asked others more precise. For any of the work, which either was not supplied according to contract or failed, the jury were told to give the price of good work of the same description, or what it cost the plaintiff to replace the defective parts. The propriety of that standard of damages for that part of the case cannot, we think, be questioned: indeed, it has not been, in argument. Then, as to the other parts of the case, we find a general instruction that the jury might give the damages sustained by the plaintiff by the failure of the defendant to make or furnish the engine by the day stipulated, viz. the first of March. This seems to us to have been going fully far enough; for, as the plaintiff gave no evidence that a house was prepared for its reception
(614) before its arrival in December the damages for the delay ought strictly, perhaps, to have been confined to the period, during which the works stood still, while undergoing the repairs rendered necessary by the breaking of some parts of the engine. For that delay the plaintiff was entitled to a fair compensation; since, as we think, the price of supplying the defective parts of the machinery is not his only loss, but to that is to be added the further loss from the capital invested lying dead, and the decay of the building and materials: in other words, a reasonable rent and insurance during the period of suspension. Damages upon that principle must be supposed to have been meant by his Honor, when speaking of those to be given for the first breach stated in the declaration; and to have been given by the jury for at least the period mentioned, and, probably, for the whole time from March, 1837, until May, 1838, when the mills went into final operation, after being repaired. At all events, the omission of the court to draw the attention of the jury to the particular period of the suspension of the works in 1838, does not furnish a ground for a new trial, inasmuch as the language of the charge would authorise the jury to take into consideration the whole time from March, 1837, and the plaintiff did not move for instructions more special on this head. On the contrary, the plaintiff repudiated that mode of measuring the damages for the delay, namely, by giving a fair rent for the time or compensation for capital invested and lying idle; and he claimed damages under the particular head of injury to the stock of timber collected by the plaintiff; of loss from the want of

employment of his hands during the repairs; and of the profits which he might have made, if the mills had gone into operation in May, 1837, instead of May, 1838. Very certainly, damages are not to be measured by any such vague and indeterminate notion of anticipated and fancied *profits* of a business or adventure, which, like this, depends so much on skill, experience, good management, and good luck for success. That would make the defendant an insurer against losses, from any cause in a business of hazard, and even against the plaintiff's want of management.

(615) The gains of the business the plaintiff might have done, or, probably, would have done, cannot be correctly estimated; and, therefore, evidence offered with a view of estimating them, as the standard of damages, was properly excluded, as being irrelevant and as tending to mislead the jury. Then as to the two other grounds for damages, the plaintiff got them for his hands being idle, if they were idle; and, therefore, there can be no exception on that score. Nor, as we conceive, is there greater ground for complaint with respect to injury to the timber. We cannot say that the plaintiff would have been entitled to damages for that loss, had the fact been established. It is not the natural consequence of the defendant's want of punctuality, in not having the engine ready according to contract. It was, rather, the plaintiff's folly, to lay in so large a stock of perishable material, before he was prepared to manufacture it. If it be liable, as he says, to injury by lying in the water, he must be presumed to have been aware of it, and ought not to have collected so much; or he might have taken it out of the water, if likely to injure there more than on land, and he gives no reason for not doing so. But furthermore, a decisive answer to this objection is that it does not appear that the timber was injured. Witnesses differed about the effect on timber of its lying in the water: some thinking it might be injurious; and others beneficial. But the plaintiff offered no evidence, that there actually was any injury to his. Consequently it would have been improper to give him damages on that account; for he can recover only the damages really sustained by him, and not such as it seems possible he may have sustained. Upon the whole, therefore, the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

INDEX.

ADMINISTRATOR:

See EXECUTORS AND ADMINISTRATORS.

AMENDMENT:

The court has a discretionary power to permit an original writ to be amended, by adding thereto the seal of the court, where that has been omitted before the writ issued. *Clark* v. *Hellen*, 421.

See EXECUTION, 1.

APPEAL:

1. Where an action is brought in the County Court against two defendants, who plead severally, and a verdict and judgment are rendered in favor of one, and against the other defendant, the latter may alone appeal from the judgment rendered against him. *Stephens* v. *Batchelor*, 60.
2. No appeal can be taken by one, who has procured himself to be made a party defendant, from an order of the County Court, confirming the report of the justice and freeholders, under the act of 1834, c. 22, (Rev. St., c. 104, s. 7) which provides for turning a public road on the applicant's own land. *Gatling* v. *Liverman*, 63.
3. A Superior Court cannot entertain an appeal to revise the exercise of a discretionary power by an inferior court, when the decision of the latter is made a matter of discretion; but if the decision were made as a matter of strict right, and upon the supposition that the inferior tribunal had no discretion, it will be reversed, and the inferior court ordered to proceed in the cause in the exercise of its sound discretion. *Reynolds* v. *Boyd*, 106.
4. If, after a verdict for the plaintiff in the County Court, the court, upon motion of defendant, order the costs of some of the plaintiff's witnesses to be taxed against him, he has a right if he thinks proper, to appeal from this order, as it was not the exercise of a mere discretionary power in the County Court. *Gash* v. *Rees*, 124.
5. If the charge of the Judge to the jury be correct, or be such that the party, against whom a verdict is found, cannot complain of it, a mistake of the jury in finding a verdict without evidence or against evidence, or against the law, forms no ground for an appeal to the Supreme Court. *Terrell* v. *Wiggins*, 172.
6. On an appeal, the Supreme Court will presume the judgment of the court below to have been right, unless error be shown; and it is the duty of the appellant to furnish the court with the means of ascertaining such error. *Wall* v *Hinson*, 276.
7. Surprise on the trial furnishes no ground for the interference of this court. That is a matter for the consideration of the court below on a motion for a new trial; and the refusal of a new trial cannot be assigned for error. *Ibid.*
8. It is the duty of the appellant to the Supreme Court to see the case so made out, as distinctly to present the points, upon which the judgment below is sought to be reviewed. *Flanniken* v. *Lee*, 293.
9. When an appeal is brought up to the Supreme Court, it is the duty of the appellant to have the transcript of the record so perfected that the Supreme Court may be enabled to discover the error in the judgment of the Superior Court, if there be any; and on his failure to do so, after a reasonable opportunity has been afforded, the judgment will be affirmed. *Stewart* v. *Garland*, 470.

10. Where the judgment below was of non-suit, and no declaration was filed, and the plaintiff, after reasonable time allowed, failed to supply that defect, *that* also is a ground for affirming the judgment. *Ibid.*

See RALEIGH & GASTON RAILROAD COMPANY.

ARBITRATION AND AWARD:

1. An award, which was to be a rule of the court, under a reference by order of the court, to arbitration, may in this State be enforced, by entering a judgment upon it for the debt and damages awarded, instead of proceeding on it by attachment. *Cunningham* v. *Howell*, 9.
2. Where an action of Ejectment was referred by rule of court, to arbitrators, and they awarded as follows: "We find the plaintiff in the case, Mary Duncan, has at various times paid to Roland Duncan, in cash, notes and property valued $1,544: we therefore award to her ¾ the whole amount of land purchased of the executors of Charles Finley, dec'd, to be taken off of the upper part of said land." *Held* that this award was not only uncertain, but that it went beyond the rule of reference, and therefore the court will not enter judgment on it. *Duncan* v. *Duncan*, 466.

See BAIL, 1.

ASSAULT AND BATTERY:

1. An offer to strike, by one person rushing upon another, will be an assault, though the assailant be not near enough to reach his adversary, if the distance be such as to induce a man of ordinary firmness, under accompanying circumstances, to believe that he will instantly receive a blow, unless he strikes in self defence. *State* v. *Davis*, 125.
2. It is not sufficient, to constitute an assault, that a man of ordinary firmness should believe that he was about to be stricken; but if it can be collected from the circumstances, that, notwithstanding appearances to the contrary, there was not a present purpose to do an injury, there is no assault. The jury must judge of these circumstances. *State* v. *Crow*, 376.
3. When the defendant, at the time he raised his whip, and shook it at plaintiff, though within striking distance, made use of the words, "were you not an old man, I would knock you down," this does not import a present purpose to strike, and does not in law amount to an assault. *Ibid.*

ASSUMPSIT:

See CONTRACT, 3, 4, 5; EXECUTION, 3, 4, 5, 6.

ATTACHMENT:

An original attachment cannot issue in this State for any cause of action arising from *tort*, but only for those founded on contract. *Minga* v. *Zollicoffer*, 278.

See EXECUTION, 2.

BAIL:

1. A reference of a cause to arbitration, by order of a court, the award to be a rule of court, will not, in this State, discharge the bail. *Cunningham* v. *Howell*, 9.
2. A sheriff on a writ of *capias ad respondendum* returned "Executed; the defendant is confined in the jail of my county on a *ca. sa.* issued by a justice of the peace in favor of A. B., consequently he cannot at present be carried to the court." The plaintiff obtained judgment on his suit and issued a *ca. sa.* to the same sheriff, who returned on it "not to be found." *Held* that the sheriff was not answerable as *bail*. *Montgomery* v. *McAlpin*, 463.

3. The return of the sheriff in such a case that the body of the defendant is in the prison of his county under other process, is a return that he *keeps* the body of such prisoner there under the process so returned, and is tantamount to a commitment under this process. After this the *sheriff* cannot take bail, but if he releases the prisoner or permits him to depart from prison, without a rule or order of court, he is guilty of an escape. *Ibid.*
4. After such commitment the prisoner can only be admitted to bail *in court*. *Ibid.*
5. Although the bail may surrender their principal, and the surrender be entered of record at the term when judgment is obtained, yet if the plaintiff does not pray the committal of the principal in execution and the latter should afterwards go at large, this is not a discharge of such principal from execution by the plaintiff. *Howzer* v. *Dellinger*, 475.
6. The bail on a plea to a *sci. fa.* seeking to charge them, cannot take advantage of any irregularity in the *ca. sa.* against the principal, but they may shew that the *ca. sa.* is void. *Ibid.*
7. A *ca. sa.* must strictly pursue the judgment and be warranted by it, as if the judgment be against two or more, the *ca. sa.* must issue against all—otherwise it is void. *Ibid.*

BEQUEST:

See DEVISES; LEGACIES.

BILLS OF EXCHANGE AND PROMISSORY NOTES:

1. Where A., the payee of a bill of exchange, indorsed it to B., and B. to C., and C. then indorses it "without recourse to him," but not saying to whom he indorsed it, it then became an indorsement in blank, and the bill became payable to bearer; and notwithstanding D. and E. afterwards indorsed it in full or specially, yet when it came again to C. by delivery, he had a right to demand payment of the bill from any prior indorser. *French* v. *Barney*, 219.
2. C. being the holder of the bill, the law implies, until something be shewn to the contrary, that he gave value for it, or came fairly and legally by it. *Ibid.*
3. To make an indorsement of a bill *special* or *in full*, it must direct payment to be made to some particular person, firm or corporation. *Ibid.*
4. A bill, once indorsed in blank, becomes payable to *bearer*, against the acceptor, drawer and all prior endorsers. *Ibid.*
5. Notice by the holder to the drawer of a bill of exchange of a demand on the drawee and a protest for non-acceptance or non-payment is not necessary, when the drawer had no funds in the hands of the drawee, unless the drawer had reasonable grounds to believe that his bill would be honored. *Spear & Patton* v. *Atkinson*, 262.
6. Notice of the dishonor of a bill is required to enable the drawer or endorser to withdraw his effects from the drawee. *Ibid.*
7. Where a creditor of a firm for goods sold and delivered, had taken the promissory note of the firm in settlement of the account, and had, after the dissolution of the firm, taken a bill of exchange drawn by one of the late partners in his own name, which was protested for want of funds of the drawer, and had delivered up the promissory note, such creditor's original claim was not merged by the promissory note or bill of exchange, but he is entitled to recover for the price of the goods sold and delivered, provided he has surrendered such bill of exchange. *Ibid.*
8. But it is essential to the recovery of the creditor, that he should have surrendered the bill of exchange to the defendants, either before or at the time of the trial. *Ibid.*

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BONDS:

1. The condition of a bond, given upon obtaining a writ of sequestration, or a judge's *fiat* in a suit in equity, that the plaintiff "shall prosecute his said suit with effect, or, in case he fails therein, shall well and truly indemnify the defendant for all damages which he may sustain by reason of the filing of said bill and the suing out of said writs, and shall further do and receive what the said court shall consider in that behalf," is not broken by any thing short of the abandonment of his suit by the plaintiff or his defeat therein. Hence, a decretal order, in the progress of the cause, that the sequestration be removed and the sequestered property restored to the possession of the defendant, and that he have leave to put the bond in suit, but without finally deciding the matters in contestation between the parties, will not authorize a recovery upon the bond for a breach of its conditions. *White* v. *Pettijohn & al.*, 52.
2. Where the condition of an injunction bond is that the complainants "shall well and truly indemnify the obligees for all damages they may sustain by wrongfully suing out the injunction," it will not be necessary for the obligees, upon a dissolution of the injunction, to bring an action on the case to ascertain the damages sustained by them, before suing upon the bond. *Falls* v. *McAffee*, 139.
3. In a suit at law upon an injunction bond, it is not necessary for the obligee to state in his declaration, or to prove upon the trial, an order of the Court of Equity, allowing the withdrawal of the bond and permitting a suit to be brought on it. *Ibid.*
4. Where a bond is given to "A. and B. and other obligees," to be paid to the said "A. and B." an action for the breach of this bond cannot be brought in the name of A. and B. alone, without joining the others or shewing that A. and B. are the surviving obligees. *Richardson* v. *Jones*, 266.
5. A payment to A. and B. would discharge the obligation; but if payment is not made, the suit must be brought in the name of the parties, with whom the obligation was contracted. *Ibid.*
6. A constable's bond, made payable to the State of North Carolina, taken by a person not authorised by law to take it, is void for want of delivery. *State* v. *Shirley*, 597.
7. There may be cases, where a bond payable to the State, although taken by an unauthorised person, if it be for the benefit of the State itself in its corporate capacity, may be good; but it cannot be so when made payable to the State, as a trustee for others, unless taken by the persons specially prescribed by some act of the Legislature. *Ibid.*
8. The will of the State is only to be known, when declared through those appointed to declare it. *Ibid.*

See EVIDENCE, 15.

CERTIORARI:

1. A *certiorari* will not be granted by the Supreme Court, where an appeal has not been brought up, through the inattention or forgetfulness of the clerk of the court, whom the appellant had constituted his agent to send up the appeal. *Cotton* v. *Clark*, 353.
2. A *certiorari* will not be granted, where a writ of error will lie. *Petty* v. *Jones*, 408.
3. Where certain defendants, securities to a sheriff's bond, had obtained a *certiorari* to bring up a case from the County Court, where judgment had been rendered against them, and upon the return of the *certiorari*, the Superior Court directed the case to be placed on the trial docket, and that a new trial be granted, and when the case came on, upon the motion of the defendants, ordered the suit to be dismissed, because

the defendants had not been duly served with notice as directed by law: *Held*, that this judgment was erroneous, and that the parties must proceed to trial upon the merits of the case. *Ibid.*

4. Upon what facts a *certiorari* will be refused in the Supreme Court, when the appellant from the Superior Court did not bring up his appeal. *Muzzell* v. *Lee*, 411.

CONSTABLE:

See BONDS, 6.

CONSTITUTION:

The Legislature has a constitutional right to pass an act, changing the location of the seat of justice of a county, although a contract for the purchase of a particular site had already been made by commissioners appointed by law for that purpose. *State* v. *Jones*, 414.

CONTINGENT INTERESTS:

Contingent interests, such as executory devises, &c., are assignable. A *possibility* cannot be transferred, but by a *possibility* is meant, the mere expectancy of an heir apparent, or of one who is next of kin to a living man, or the prospect of having a legacy left, &c. *Fortescue* v. *Satterthwaite*, 566.

CONTRACT:

1. Where a contract was made for the sale of a lot of cotton, in which it was agreed as follows: "The price to be fixed on in the following manner: the seller is to select either Fayetteville, Cheraw or Camden, and to name a time, and the prices are to be regulated by the prices at the named market and time, the price to be the same as good crops of cotton sell for at the time: the price to be fixed on by the first of June next:" *It was held* that by a just construction of the contract the seller was to name before hand a market and a day, by which the price was to be regulated, and that he could not on the last day allowed him, name a market and a preceding day for that purpose. *McNeely* v. *Carter*, 141.
2. Where, in an action to recover damages for a breach of promise, it appeared in evidence that a vessel, her tackle, &c., had been sold by the defendent to the plaintiff, on the 10th December, 1835; that after the great fire in New York, which occurred on the 16th of December in that year, some of the vessel's boats and sails were missing, and were supposed to have been destroyed by the fire—and subsequently it was agreed between plaintiff and defendant that the defendant should pay to the plaintiff "whatever sum it should require to put the vessel in the same repair and condition *in which she was at the time of the sale*, over and above five hundred dollars." *Held* that upon this evidence the plaintiff could not recover on a count, in which he charged that the defendant had made a *false representation* at the time of the sale, and that he had promised to put the vessel, &c., *in the state represented*, over and above the sum of five hundred dollars. *Walker* v. *Baxter*, 213.
3. A party cannot recover on an implied agreement for the price of goods sold and delivered, if he could have maintained an action on a special contract relating to that price. *Carter* v. *McNeely*, 448.
4. But where the special contract is imperfect, as where the price was to be the market value on a certain day and at a certain place to be fixed by the seller, and he fails to select in proper time the day and place, he may yet maintain an action for the value of the goods delivered, and declare in *indebitatus assumpsit*, on a *quantum valebat*. *Ibid.*

5. But regard must be had to the special agreement so far, that the plaintiff cannot recover a higher price for the goods, than he could have done, if he had literally or duly observed the terms of the special contract. *Ibid.*
6. Where the owner of a vessel agreed to hire her to another, for a certain period and at a certain price, and stipulated at the same time that she be "furnished with sufficient cables, anchors and other tackling;" and the vessel was lost before the expiration of that period, in consequence of a defect in one of the cables; it was *held* that the owner could not recover the hire for the whole period, under the special contract, although it appeared that the defect in the cable (an iron cable) could not have been discovered by the most attentive examination. *Parker* v. *Gilliam*, 545.
7. Such a stipulation means that the "cables, &c." are *actually* sufficient and not merely that that they are *apparently* so. *Ibid.*

See DAMAGES, 1; EVIDENCE, 19.

COSTS:

1. The costs which the act of 1818 (Rev. St., c. 4, s. 26) requires to be taxed double against a party who appeals to the Supreme Court and fails to carry up and file the record in proper time, are only those of the Supreme Court. *Hester* v. *Hester*, 187.
2. The court can, in no case where the grand jury returns a bill "not a true bill," order the prosecutor to pay the costs. *State* v. *Cockerham*, 381.
3. Nor is an indictment for perjury one of those "frivolous or malicious" prosecutions, in which the court has power, even upon an acquittal of the defendant by a petit jury, to order the prosecutor to pay the costs; because at the time the act was passed giving the court power in certain cases to order the prosecutor to pay costs, the punishment of persons for perjury did extend, and, in some peculiar cases, does now extend, to the loss of a member. *Ibid.*

See APPEALS, 4; WILLS, 9; EXECUTION, 10; MANDAMUS, 1.

DAMAGES:

1. In an action of covenant, for not furnishing machinery for a steam mill at the stipulated time, the plaintiff cannot recover in damages the estimated value of the *profits* he might have made if the covenant had been complied with. These are too vague and uncertain to form any criterion of damages. *Boyle* v. *Reeder*, 607.
2. The damages should be given upon the principle of a reasonable rent and insurance for the buildings, and the actual loss by decay, &c., of the materials during the period he was prevented from commencing his operations by reason of the default of the defendant in not complying with his covenant. *Ibid.*
3. He can only recover damages really sustained by him, and not such as it seems possible he may have sustained. *Ibid.*

See MASTER AND SERVANT, 2; MILLS, 2, 3.

DEEDS:

1. By a proper reference of one deed to another, the description in the latter may be considered as incorporated into the former, and both be read as one instrument, for the purpose of identifying the thing intended to be conveyed. *Everitt* v. *Thomas*, 252.
2. But there must be no inconsistence between the calls of the latter deeds and the former deeds or grants; as, for instance, where the former deed or grant calls for a line of another patent and the latter deed omits that call, but goes for a particular course and distance, and only professes to convey a part of the tract embraced by the grant or

former conveyance. In such a case the course and distance called for, being the specific description in the deed, must prevail. *Ibid.*

3. It is a sound rule in the construction of a deed that a perfect description, which fully ascertains the *corpus*, is not to be defeated by the addition of a further and false description. *Mayo* v. *Blount*, 283.
4. But the court has no right to strike out one part of the description more than another, unless the part retained completely fits the subject claimed, and the rejected part does not; unless, further, it appear that the whole description, including the part sought to be rejected, *is applicable to no other thing.* It must be shewn, at least to the degree of moral probability, that there is no *corpus* that will answer the description in every particular. *Ibid.*
5. If the words in a deed of sale of goods and chattels plainly evidence a sale, this is sufficient without technical words. Such a deed of sale may be made without any words of "bargain and sale," as well as with those words. *Fortescue* v. *Satterthwaite*, 566.

See LIMITATIONS BY DEED—GRANTS.

DESCENTS:

1. Where an estate had been transmitted by descent and the blood of the acquiring ancestor had become extinct, upon the death of the person last seized intestate and without issue, the estate descended to her nearest collateral relations, who were a brother and two sisters of the half blood on her father's side, the land having descended from a maternal ancester. *University* v. *Brown*, 387.
2. A. died in the year 1777, leaving two sons Thomas and George. Thomas was the oldest son, and, by the law of this State as it then stood, sole heir to his father. A. devised the land in controversy in this suit to his second son George. George died in 1839, intestate and without issue, leaving surviving him a sister of the whole blood, under whom the defendant claimed, and the issue of a sister of the half blood on the mother's side, who are the lessors of the plaintiff. *Held* that the issue of the sister of the half blood took one moiety of the land. *Burgwyn* v. *Devereux*, 583.

DETINUE:

1. One tenant in common of a chattel cannot maintain detinue for such chattel against his co-tenant. *Bonner* v. *Latham*, 271.
2. In an action of detinue, the defendant may be permitted to plead, as a plea since the last continuance, the death of a slave named in the declaration; and in such a case, the jury should be instructed that, if such death has happened, while the slave was in the defendant's possession and without his fault, they should not include any part of the value of the slave in the estimate of damages; but if it has happened because of ill-treatment or culpable neglect, or, after a disposition of the slave by the defendant, they may include the value in such estimate. *Bethea* v. *McLennon*, 523.
3. Evidence ought not to be received of the alleged death, unless the matter be specially presented by a plea; and this plea may be received, if properly verified, at any moment before the verdict is rendered. *Ibid.*
4. The jury, however, in such a case, should give damages for the detention of the slave, while living. *Ibid.*

DEVISE:

1. Where the testator, after giving certain legacies to his children, and directing that the residue of his estate should be equally divided among them, upon their accounting for the advancements which they

had received, added, "this direction is not to apply, in case a negro lent or given shall die before me, that being my loss; but when any of the said negroes shall have been sold or suffered to be sold, they shall be charged at their value at the period of such sale, except in case of my grandson T. son of my deceased son G. B., who is to pay my executors $500, in full of all advancements made to him or to his father," *it was held,* that the grandson was bound to account for only the sum of $500, and not that sum, in addition to the value of 2 negroes, which had been given to his father and sold by him; and that no parol evidence could be received to shew that the testator intended his grandson to account for the $500, in addition to the value of the said negroes given to his father. *Blacknall* v. *Wyche,* 94.

2. Where a testator, who had three tracts of land, adjacent to each other, over parts of all which his plantation extended, and had three sons R., J. and W., of whom R. and J. were married and resided upon the testator's land, devised to his wife "full possession of all the plantation and stock, &c. during her natural life or widowhood, except the particulars that may hereafter be mentioned," and then devised to his son R. "all the 200 acre tract that he now lives on, and so much of the old tract as lies on the same side of Homony creek, &c.; and in a subsequent part of his will devised as follows; "I will and bequeath to my son J. all the remaining part of the old tract of land, exclusive of the part abovementioned to my son R. and bequeath unto my son J. my still and all her furniture at the death or marriage of my wife. Also my wagon and hind gearing at her death." *It was held,* that the testator's son J. took an immediate estate in fee in the lands devised to him, and not an estate in remainder after the death or marriage of the testator's widow. *Jones* v. *Posten,* 166.
3. In expounding a will, the grammatical construction must prevail, when an intent to the contrary does not plainly appear. *Ibid.*
4. A testator devised to his wife as follows: "It is my will and desire that my loving wife Margaret, shall retain and keep in her possession all that I may be possessed of at my death, (my debts and funeral expenses being first paid,) during her natural life." It appeared in evidence that the testator had lived for many years, and at the date of his will and at the time of his death, on a certain plantation. The will was made in 1815. In 1811, upon the marriage of his son, the defendant in this case, he had permitted him to occupy a small portion of the plantation, with an understanding that his son was to remove as soon as he built a house on his own land. In 1813 the testator insisted the son should remove, which he refused to do until his house should be completed, which would be in 1814. The testator, and not the defendant, always gave in the land for taxation and paid the taxes. *Held* that under the words of this devise the land passed, and that from other clauses of the will and the parol testimony, it was clear the testator intended to devise the part occupied by his son, which occupation was in fact only the possession of the testator. *Bolick* v. *Bolick,* 244.
5. *Held* also that parol testimony is admissible to explain an obvious ambiguity of expression, as to the description of the subject of a devise, as for instance to shew the situation or occupation of the land at any given time, or whether parcel or not parcel of the subject devised. *Ibid.*
6. A devise of "all my property of any nature or kind whatever, which deeds, papers and moveables will shew," can, by no intendment nor construction, be taken to indicate an intention in the testator to devise the land, which belonged to his wife. *Mitchell* v. *Mitchell,* 257.

7. A testator, after bequeathing certain negroes to his wife for life, or during widowhood, bequeaths as follows; "I wish for the negroes lent to my wife, if they do not behave, to be hired out. I also wish for all the negroes not given to be hired out as soon as they will bring anything. And after the death of my wife or marriage, I want all my property not given away to be equally divided among my girls." The negro for which this action was brought, was one of those directed to be hired out. *Held* that the daughters had only an interest in remainder after the death or marriage of the widow, and that therefore the plaintiff, who claimed under a conveyance from the husband of one of the daughters, could not bring trover for the negro during the lifetime of the widow, or while she remained unmarried. *Smithwick* v. *Biggs*, 281.
8. Where the surplus of an estate is left by will to be equally divided "between the heirs of A. B. and the heirs of C. D.," the children or heirs of A. B. and C. D. take *per capita* and not *per stirpes*. *Hobbs* v. *Craige*, 332.
9. Where a testator bequeathed as follows: "I do will and bequeath unto my wife, Susannah, all my estate and effects remaining in my executor's hands, after all my just debts are paid, the said property to be and remain my beloved wife's during her natural life; she is not allowed to sell nor dispose of said effects in any shape whatever, agreeable to this my last will, with the exception of a negro boy child by the name of Larkin. I then further will, that at the decease of my wife, Susannah, command my executors to make an equal distribution of the said property between my five lawful heirs;" and nothing further is said about Larkin: *Held by the court*, that the absolute interest in the boy Larkin, passed to the widow Susannah. *Matthias* v. *Rhea*, 394.
10. Where a testator bequeaths a negro woman and *her increase*, and there are no other words in the will to explain his meaning, only the increase, born after the death of the testator, will pass. *Cole* v. *Cole*, 460.
11. A testator devised certain negroes to his three children, J., S. and N. and then proceeded as follows: "In case either of my said children should die without heir lawfully begotten, it is my wish that the property should be equally divided between the children *then living*, whether J., S. or N." J. died first. N. then died without issue, leaving S. surviving. *Held* that under this limitation S., the surviving child, took the property belonging to N. *Fortescue* v. *Satterthwaite*, 566.
12. A testator devised as follows: "I leave the whole of my other estate as well negroes as goods and chattels, to be equally divided between my four children, A., B., C. and D., and for my executors to have it appraised and pay off each child's part as they shall come to age, the boys to have their part at the age of 21 years, and the girls to have their part at the age of 18 years; *and if either of my children die without heir lawfully begotten, then his or her part to be equally divided between my surviving children and their heirs forever.*" A. died first, leaving children. B. afterwards died leaving no children. *Held* that the limitation over in the will was not too remote; that on B.'s death without issue, his share became vested in C. and D., who survived him; and that as A. did not survive him, no part of such share vested in the personal representative or the children of A. *Threadgill* v. *Ingram*, 577.

See LEGACIES.

EMANCIPATION:

Where a testator residing in Virginia, where the law allows masters to liberate their slaves by deed or will, bequeathed as follows: "My

will and desire is that my negro woman P. shall have her freedom immediately; and that all the rest of my black people shall serve until my youngest child shall be of the age of twenty-one years, for the use of raising my children and young negroes. After my youngest child is of age, my will is that all my negroes shall be free:" It was *held* that the child of one of the negro women mentioned in the will, born after the death of the testator, but before his youngest child came of age, was entitled to freedom after the latter event. *Campbell* v. *Street*, 109.

ESTOPPEL:

1. The rule that a lessee cannot dispute his landlord's title, extends to the case of one, who takes possession under a contract of purchase—he cannot controvert the title of the person who let him into possession. *Love* v. *Edmonston*, 152.
2. Where the husband of a woman entitled to a contingent remainder in slaves, before the contingency happened, conveyed this interest by deed; *it was held* that this deed was an estoppel as to the husband, and when the contingency afterwards happened, by which the interest vested in the wife, such interest passed to the grantee, either upon the principle that the interest, when it accrued, *fed the estoppel* and thereby gave an absolute title, or that the deed operated as a release of the wife's *choses in action*. *Fortescue* v. *Satterthwaite*, 566.

EVIDENCE:

1. Testimony as to hand-writing, founded on what is properly termed a comparison of hands, seems now to be generally exploded; and the only admissible testimony of hand-writing is that of a witness, who has acquired a knowledge of the party's hand-writing from having seen him write, or from having had a correspondence with him upon matters of business, or from transactions between the witness and party, such as the former having paid bills of exchange for the latter, for which he has afterwards accounted. *Pope* v. *Askew*, 16.
2. On an indictment for a riot and trespass on land, it is only necessary to prove the possession of him, to whom the injury is done; and that may be by parole evidence without the production of any paper title. *State* v. *Wilson*, 32.
3. Where the attesting witness to a bond is dead, its execution may be proved by proof of the witness' hand-writing; but if such evidence cannot be had, then proof of the obligor's hand-writing is admissible; but before the latter testimony will be received, the party offering the bond must shew to the court that he has done all in his power, without effect, to procure evidence of the hand-writing of the subscribing witness. Hence, where it appeared that the subscribing witness to a bond had been clerk of the County Court of a large, populous and wealthy county, and had been dead only twenty-five years, *it was held* not to be sufficient for admitting testimony of the obligor's hand-writing to shew, by one witness only, that he did not know the subscribing witness' hand-writing and did not know of any person who had such knowledge. *McKinder* v. *Littlejohn*, 66.
4. The presumption of the payment of a bond, raised by a forbearance for twenty years (or for ten years, since our act of 1826, Rev. St., c. 65, s. 13) may be repelled by evidence that the debtor had not the means or the opportunity of paying: and the repelling of the presumption will not be hindered by the fact that the debtor had the interest in remainder in certain slaves, but which did not vest in possession until a short time before the suit was brought, when it did not appear that the creditor knew of the existence of this interest in

remainder, and it was evident that it was not, in fact, applied to the payment of the debt. *Ibid.* S. P. *Wood* v. *Deen*, 230.

5. When the subscribing witness to any instrument, except a negotiable one, becomes interested in a suit brought upon the instrument, his hand-writing may be proved to establish the execution of the instrument, whether his interest was thrown upon him by operation of law, or was acquired by his own voluntary act. *Saunders* v. *Ferrill*, 97.
6. A., B. and C. entered into a co-partnership in the name of A. & Co. for the purchase and sale of negroes, and it was afterwards agreed between them that A. and B. should alone be interested in the negroes purchased with cash, but all three should be equally interested in the negroes purchased on a credit: *it was held* that, though C. might be held responsible on all contracts by all persons dealing with the firm of A. & Co., yet that he was a competent witness to testify for A. and B. in an action on the warranty of soundness contained in a bill of sale for a negro purchased in the name of A. & Co. for cash. *Williamson* v. *Cannaday*, 113.
7. In an action for seduction, the defendant cannot prove that his general character is that of a modest and retiring man. The general rule, to which this forms no exception, is, that unless the character of the party be put directly in issue by the nature of the proceeding, evidence of his character is not admissible. *McRae* v. *Lilly*, 118.
8. The records of the proceedings against a sheriff, for an amercement imposed on him, are not evidence against his sureties to prove his default; but they are admissible against them to prove the fact of the existence of the amercement itself. *Governor* v. *Montfort*, 155.
9. If the surety to a bond or note be sued alone, the principal debtor will be incompetent as a witness for him, because, if the plaintiff succeeds, he will be liable to the surety for the costs of the action; but the principal may, in such action against the surety, be made competent by a release from the surety, before he is called to testify. *Moffitt* v. *Gaines*, 158.
10. A party may prove the fact to be different from what one of his own witnesses has stated it to be. That is not discrediting his witness. *Spencer* v. *White*, 236.
11. Where the question was one of domicile at the date of the writ, and the defendant proved that the plaintiff, before the date of the writ, had gone from one county to another, and wished the jury to infer from this an abandonment of his former home, the testimony of a witness who swears that "this was not regarded in his (the plaintiff's) father-in-law's family, where the plaintiff resided, and where the witness, a member of the family, also resided, as an abandonment of the plaintiff's then place of residence," is admissible; for it does not appear that the witness came to his knowledge by the *ex parte* hearsay of any of the members of the family, but he may have derived it from other facts apparent at the time to the family. *Fleming* v. *Straley*, 305.
12. Parol evidence may be received to shew when a writ issued. The act of Assembly directing the clerk to mark the day of issuing process is only directory, and does not exclude other evidence. *Jenkins* v. *Cockerham*, 309.
13. In an action of slander, the defendant cannot, to support his plea of justification, give evidence of transactions or conversations between himself and others, to which the plaintiff was not privy. *Ibid.*
14. On the trial of an indictment for forgery, the person, whose name is charged to have been forged, and whose interest, supposing the instrument to be genuine, is affected by it, either as an obligation or acquit-

tance, is not, while the instrument remains in force, a competent witness to prove the forgery. *State* v. *Stanton*, 424.

15. Where to an action of debt on a bond for one hundred dollars, the plea was that it was given to compromise an indictment for a misdemeanor, the acts and sayings of the son of the plaintiff, who did not appear to be an agent of the plaintiff, not in the presence of the plaintiff, are inadmissible as evidence. *Redman* v. *Roberts*, 479.
16. Where a defendant in ejectment is sued for thirteen contingent tracts of land and the plaintiff proves that he was in the actual possession of one, and contends that, as the others were adjoining, his possession must be considered as extending to them also; it is competent for the defendant to give in evidence his own declaration, made at the time he took possession of the one tract, that he disclaimed any possession of the other twelve tracts. *Davis* v. *Campbell*, 482.
17. Such declarations may be received, not to establish the verity of any fact asserted therein, but as, either part of the fact itself, or characterising and illustrating the fact of possession. *Ibid.*
18. On the trial of an issue *devisavit vel non*, where the will is propounded by two legatees, one of whom is a colored woman, and the other a white woman, and the caveators are colored persons, the caveators may prove by other colored persons the declarations of the colored woman, one of the parties propounding, in relation to the subject matter of the issue. *Ragland* v. *Huntingdon*, 561.
19. In an action on a contract, a defendant cannot be admitted as a witness for his co-defendants, even after he has suffered judgment by default to be taken against him. *Walton* v. *Tomlin*, 593.

See DETINUE, 3; DEVISE, 1, 4; MAIM, 2; MALICIOUS PROSECUTION; MARRIAGE SETTLEMENTS, 3.

EXECUTION AND EXECUTION SALES:

1. Where the Clerk of a Superior Court has omitted to affix the seal of his court to a writ of *fi. fa. and venditioni exponas*, directed to another county, the court may, at a subsequent term, order the Clerk to affix his seal *nunc pro tunc*, in order to protect the purchaser of land sold under it, where no third person claiming under one of the parties to the execution is to be affected thereby. *Purcell* v. *McFarland's heirs*, 34.
2. A sheriff, who, after seizing goods under an execution or attachment, leaves them on the premises of the debtor not separated from the other goods of the debtor, and for the use of the debtor or his family as before the seizure, thereby *prima facie* loses his property in them, upon the grounds of presumptive fraud and abandonment, and another officer may seize and sell them; unless the delay to remove them be but for a reasonable time, and then be accounted for by the state of the property, as, for example, that it was a growing crop or an article in the course of being manufactured or the like. *Roberts* v. *Scales*, 88.
3. The person, who has the legal title to property sold under execution, has alone the right to recover the balance that remains from the proceeds of the sale, after satisfying the execution. *Taylor* v. *Williams*, 249.
4. Where A. fraudulently conveyed a slave to B., and A.'s creditors afterwards caused the slave to be sold by execution, and the slave sold for more than enough to satisfy the execution, *it was held*, that B., the fraudulent vendee, and not A., the fraudulent vendor, had a right to recover the balance, because as between A. and B. the legal title was vested in B. *Ibid.*

5. And an order by A. on the officer for this balance in favor of B., and presented by B., does not alter the case, for these acts do not transfer to A. the legal title, which is necessary to support the action. *Ibid.*
6. A creditor, who has an execution in the hands of a sheriff, has a right to recover from him such a proportion of the value of the property, which ought to have been sold, as would, if there had been a sale according to the duty of the sheriff, have been applicable to his execution. *State* v. *Hampton*, 318.
7. It is not only the duty of the sheriff, when he receives a *fieri facias*, to seize property, if he can find it; but it is also his duty to sell the property seized before the return of the writ, unless he have some lawful excuse for not doing so—such as the want of time or of bidders, or the indulgence of the creditor. For a failure in this respect he is liable to an action on his official bond, in which there must be a recovery of, at least, nominal damages. *Ibid.*
8. A return by a sheriff on a *fieri facias* that "he has levied on goods, subject to older executions," without saying whether he had sold the property seized or still had it in his hands, or, if the latter, why he had not sold—whether for want of bidders, or of time, or other sufficient excuse—is not a "due return," because it does not answer the writ. *Buckley* v. *Hampton*, 322.
9. The sheriff who makes such a return is, therefore, liable to the fine of $100 imposed by the act of 1777 (Rev. St., c. 109, s. 18) for not making due return of process placed in his hands. *Ibid.*
10. Where an execution on a judgment is returned satisfied, the judgment is extinguished; and another execution cannot be issued, as for instance for attendance dues for a witness omitted in the first execution, until the return on the first execution is set aside or corrected, or an order of the court in nature of a further judgment is rendered. *Poor* v. *Deaver*, 391.
11. Where a sheriff or other officer sells under a valid execution, it is no objection to the title of the purchaser, that, in his deed of conveyance, he misrecites the execution. *Cherry* v. *Woolard*, 438.
12. Where a clerk issued an execution, tested on the 5th Monday after the 4th Monday of September, in the year of our Lord, 1833, and in the 57th year of our independence, and indorsed thereon that the execution actually issued on the *5th of February*, 1833, and the Coroner also endorsed that it was levied on the *21st of February*, 1833, the court must see that the dating of the writ, as to the *Christian era*, was a misprision of the Clerk, and will correct it accordingly. *Ibid.*
13. When the proceedings before a magistrate, upon which he issues an execution, are annexed thereto and it is apparent from them that there is no judgment authorizing an execution, the constable who has the execution, must take notice of that fact, and will be guilty of a trespass, if he proceeds to make a levy under the process. *Whitfield* v. *Johnston*, 473.
14. A purchaser at an execution sale acquires no other or further title, than the defendant in the execution had at the time of the sale. *Flynn* v. *Williams*, 509.

See JUDGMENT, 3, 4, 5; BAIL, 5, 7; FRAUDULENT CONVEYANCES, 1, 12, 13, 14.

EXECUTORS AND ADMINISTRATORS:

1. If one or two or more obligors in a bond administer on the estate of the obligee, he cannot maintain an action on the bond against the other obligors; and, though the action is only suspended during the life of the administrator, and may be brought by the administrator *de bonis non* of the intestate, yet the defence is properly upon a plea in bar, instead of a plea in abatement. *Carroll* v. *Durham*, 36.

2. If one of the obligors become an executor of the obligee, the action is not merely suspended, but the debt is extinguished. *Ibid.*
3. But in such cases both the executor and administrator must account for the debt as assets to creditors, and legatees or next of kin. *Ibid.*
4. What relief a surety, who administers upon the estate of the obligee, may have against his co-obligors discussed. *Ibid.*
5. A payment by an administrator of the assets of his intestate to the next of kin, within less than two years after his qualification and without taking refunding bonds, will not support the plea of fully administered against a non-resident creditor, who has brought his suit within three years from the time when the administration was taken. *McKinder* v. *Littlejohn*, 66.
6. The Court of Probate may accept the renunciation of an executor at any time before he has intermeddled with the effects of his testator, even after he has proved the will. So of the executor of an executor as to the first will. *Mitchell* v. *Adams*, 298.
7. Where A. died leaving a will, appointing B. his executor, and B., after proving the will, died leaving C. and D. his executors, who accepted the trusts of the latter will, and qualified as executors thereof, but without at the time renouncing as to the first will, but they never intermeddled with the effects of the first testator: *held* that the Court of Probate had the power, years afterwards, to accept their renunciation as to the first will, and grant administration *cum testamento annexo*. *Ibid.*
8. *Held further*, that these acts, being within the power and jurisdiction of the Court of Probate, could not be incidentally or collaterally impeached in any other court, but could only be attacked upon an application to the Court of Probate to revoke the letters of administration and recall the executors. *Ibid.*
9. After probate of the will an executor cannot renounce at his own pleasure, but can only do so by leave of the court. *Ibid.*
10. An executor or administrator may be called to account by petition or bill in equity by the legatees or next of kin, before the expiration of two years from the time of probate or of administration granted. The act of Assembly compels them to settle within that time, but does not authorise them to defer the settlement without necessity. The court, to whom the bill or petition is presented, can prevent any premature decision, which may do injustice to the executor or administrator. *Hobbs* v. *Craige*, 332.
11. On an account upon a petition or bill against the administrator or executor, he should not be charged with monies which he had not by reasonable diligence been able to collect. *Ibid.*
12. As to matters, where it was doubtful whether he could collect or not, these should be left to a future account, the plaintiffs, in the mean time, taking a decree *in part* for what was certainly due. *Ibid.*
13. The County Courts have the power to grant administration in this State of the effects of persons, who resided and died in another country. *Smith* v. *Munroe*, 345.
14. The court of the county, in which such deceased person had effects to be administered on or *bona notibilia*, is the proper county to grant the administration. *Ibid.*
15. A right to a distributive share of an intestate's estate constitutes such *bona notibilia* as entitles the court to grant administration. *Ibid.*
16. Where the next of kin reside abroad, it is in the power and it is the duty of the court to grant administration to the appointee of such next of kin. *Ibid.*

See LIMITATIONS, LEGACIES, PETITION.

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FEME COVERT:

1. Where a commission issued, by order of a County Court, to take the private examination of a *feme covert* as to her execution of a deed, the recital in the commission that "it has been represented to our said court, that M. W. (the *feme covert*) is *indisposed*, so that she cannot travel to our said court," &c., is as effectual as if the same recital had been made in the order of the court directing the commission to issue. *Skinner* v. *Fletcher*, 313.
2. The words "indisposed, so that she cannot travel," &c., taken in reference to the subject matter, must mean unable to travel from sickness. *Ibid.*
3. Where the commissioners certified that they took "the *private* examination" of the *feme covert*, and that she acknowledged that "she executed the deed without any compulsion from her husband or any other person," this is sufficient, without saying that she was examined "privily and apart from her husband." *Ibid.*
4. On the subject of the examination of *feme coverts*, as to the execution of deeds, the phrases "privy examination," "private examination," and "examination separate and apart from her husband," are indifferently used in our acts of Assembly. *Ibid.*

See WILLS, 3, 4, 5, 6, 7.

FORCIBLE ENTRY AND DETAINER:

1. In an inquisition and proceedings had before justices under our statute of *Forcible Entry and Detainer*, (Rev. St., c. 49,) if the verdict of the jury sets forth that "the relator was possessed as tenant for years of A. B." that is sufficient without specifying what that term is. *State* v. *Nations*, 325.
2. An objection to an inquisition for forcible entry and detainer, that the relator has elected to proceed by indictment, is of no avail, as our statute does not give the justice any power to fine. *Ibid.*
3. When the proceedings on an inquisition of *Forcible Entry and Detainer* before justices of the peace are brought up by *certiorari* to the Superior Court, that court has no right to order a *traverse* to be tried before them, as the traverse either has been tried, or might have been tried before the jury required to be summoned by the justice below, and no appeal is allowed by statute, the remedy being a summary one. *Ibid.*
4. If the justices were guilty of misconduct in the trial below, either by receiving improper testimony or rejecting proper testimony or otherwise, the Superior Court can correct this misconduct; but the affidavits to obtain a certiorari must state explicitly the facts upon which the interference of the Superior Court is called for. *Ibid.*
5. Upon a proper affidavit a *mandamus* as well as a *certiorari* will be granted to compel the justices to return all the proceedings, as they actually occurred. *Ibid.*

FORGERY:

See EVIDENCE, 14.

FORNICATION AND ADULTERY:

The marriage between a free person of colour and a white person, is, by the law of this State (act of 1838, c. 24), null and void, and therefore, when such persons bed and cohabit together, they come within the provisions of the act of Assembly against Fornication and Adultery, Rev. St., c. 34, s. 46. *State* v. *Fore & al.*, 378.

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FRAUD:

See FRAUDULENT CONVEYANCES; MARRIAGE SETTLEMENTS.

FRAUDULENT CONVEYANCES:

1. Where a debtor conveyed a slave, together with other property, both real and personal, to his creditor, to hold to him and his assigns forever; but the deed was expressed to be made upon condition, that if the debtor should pay the amount due by a certain time, it was to be void; and the creditor covenanted that, until that time, the debtor should retain the possession and enjoyment of the property; and, before the expiration of the time, the creditor, with the assent of the debtor, took possession of the slave, from whom he was taken under an execution in favor of another person against the debtor; *it was held* that, under the deed, the creditor had the legal title of the slave, and that only such an equitable interest remained in the debtor as could not be taken or sold under an execution, and that, for the taking of the slave under the execution against the debtor, the creditor might maintain an action of trover. *Burgin* v. *Burgin*, 160.
2. An absolute bill of sale of slaves, accompanied with a parol contract between the parties that the vendor might re-purchase the slaves by re-paying the same price, is not void against the creditors of the vendor, under the act of 1820 (Rev. St., c. 27, s. 23) or the 13th Eliz. (Rev. St., c. 50, s. 1), when it is admitted that the sale was not, and was not intended to be, a mortgage, but was *bona fide* absolute and for a fair price. *Newsom* v. *Roles*, 179.
3. A deed, absolute on its face, but intended as a mortgage only, is fraudulent and void against creditors and purchasers, and against subsequent as well as prior creditors. *Halcombe* v. *Ray*, 340.
4. Such a deed cannot be rendered valid by any subsequent agreement between the grantor and grantee, that the grantee should have all the interest of the grantor in the premises, and by the actual payment by the grantee, in pursuance of such agreement, of the full value of the land to the grantor's creditors. *Ibid.*
5. Nor even where the deed is re-delivered subsequently to and in pursuance of such agreement. Having taken effect as between the parties, on the first delivery, the deed could not be surrendered to be re-delivered. *Ibid.*
6. Where a creditor, knowing that another creditor has taken a deed of trust, but which is not registered, takes another deed of trust on the same property, to secure his own debt, and procures it to be first registered, this is no fraud against any person, at least at law; more especially it is not a fraud against those who do not claim under the creditor secured by the first deed. *Burgin* v. *Burgin*, 453.
7. It is no ground for the court to pronounce a deed in trust fraudulent, *per se*, as against other creditors, that the property conveyed was to be sold at private sale; or that the surplus, after payment of the debts secured, was to be returned to the bargainor; or that the property conveyed is greater in value than the debts secured; these are circumstances to be submitted to a jury, to aid them in determining whether the intention of the parties was *bona fide*, or otherwise. *Ibid.*
8. Neither will a delay in selling under a deed of trust, *bona fide* at first, avoid it; unless the delay and the uses had of the property by the debtor were such as to give him a false credit, and hold him out to the world as the owner of the property. *Ibid.*
9. Though a debtor has a right, by the laws of this State, by a deed of trust, to convey all his property for the purpose of paying certain

creditors in preference, yet there must be no condition, direct or indirect, controlling this application. *Hafner* v. *Irwin*, 490.

10. Such a deed must be *bona fide* for the purpose it professes to have in view, and any provision by which a sale under it is unreasonably postponed, or by which the debtor is to obtain a benefit for himself or his family, or any agreement by which the transaction is to be kept secret, until the debtor has an opportunity of getting beyond the reach of process issued by his other creditors, or by which the deed is not to be registered until the other creditors sue or threaten to sue, will make the deed fraudulent, because it shows that the one object of the deed was to hinder, defeat or defraud some creditors. *Ibid.*
11. If only a part of the consideration of a deed is fraudulent against creditors, the whole deed is void. *Ibid.*
12. Where land was purchased by A. but the deed of conveyance was made to her daughter B., who became personally liable for a part of the consideration money, a creditor of A. cannot sell this land under an execution at law to satisfy a judgment obtained by him against A. although the land was so conveyed expressly to protect it from the debts of A. *Gowing* v. *Rich*, 553.
13. It cannot be so sold by virtue of the Statute of Frauds, Rev. St., c. 50, s. 1, because that only avoids conveyances made by the debtor himself. *Ibid.*
14. Nor can it be sold under the act of 1812, Rev. St., c. 45, s. 4, subjecting trust estates to execution, for that only applies to a case, in which the debtor, the *cestui que trust*, could immediately and unconditionally claim a conveyance of the legal estate from the trustee—not to one where the trustee needs the legal title to subserve the rights of himself or of third persons. *Ibid.*
15. In the present case B., the grantee and trustee, before she could be compelled to part with the legal title, had a right to be compensated for the money she had paid or to be indemnified for the liability she had incurred in relation to the consideration of the purchase. *Ibid.*
16. The remedy of the creditor was in equity, but on a different principle, and that is, the right in equity to follow the funds of the debtor. *Ibid.*

FREE PERSONS OF COLOR:

See FORNICATION AND ADULTERY.

FREIGHT:

1. When goods are shipped on board of a vessel, to be carried for freight, the master of the vessel, on his arrival at the port of delivery, has a right to retain the goods until the freight is paid by the consignee. *Spencer* v. *White*, 236.
2. But yet if he delivers the goods to the consignee, without receiving the freight, the shipper of the goods, if he is also the owner, and the consignee merely his agent, is liable for the freight, notwithstanding the common clause in the bill of lading, "to be delivered to the consignee or his assigns, he or they paying freight for the same." *Ibid.*
3. Generally a consignee, by receiving the goods, becomes liable for the freight; but, it seems, it is not so, when he is only the agent of the consignor, and that is known to the master. *Ibid.*

GAMING:

An indictment under the Statute (1 Rev. St., c. 34, s. 69) will not lie against one for playing cards in a tavern, if he do not bet on the game, though the other persons with whom he may play do bet. The statute embraces two cases, the playing *and* betting at cards in a

tavern, and the merely betting upon a game played by others, but does not reach the case of playing only without betting. *State* v. *Smitherman*, 14.

GRANT:

1. A grant of land, bounded in terms by a river or creek *not navigable*, carries the land to the grantee *usque ad filum aquæ*, to the middle or thread of the stream. *Williams* v. *Buchanan*, 535.
2. Where two grants or deeds *lap*, and neither party has the *actual* possession of the *lapped* part, the law adjudges the possession of that part in him, who has the better title; but if either be *actually* in possession of the *lapped* part, the law adjudges him to be in the exclusive possession thereof. *Ibid.*

GUARDIAN AND WARD:

1. The County Court, in proceeding under the act of 1789, (Rev. St., c. 63, s. 11,) authorising an order to issue to a guardian, empowering him to sell the property of his ward for payment of the debts of the ward, must first ascertain that there are debts due by the ward, which render the sale of the property expedient; and the court must also select the part or parts of his property, which can be disposed of with least injury to the ward. *Leary* v. *Fletcher*, 259.
2. Therefore an order of the County Court in the following words: "Ordered that A. W. (the *guardian*) have leave to sell as much of the lands belonging to the orphans of Stephen Mullen, deceased, as will satisfy the debts against said deceased's estate" is unauthorised by law, and void; and a purchaser under a sale, made by the guardian in pursuance of such order, acquires no title. *Ibid.*

HIGHWAY:

1. The common law mode of creating and establishing a public highway, is not repealed by any of our acts of Assembly. *Woolard* v. *McCullough*, 432.
2. The *user* of a road as a public highway, for twenty years, will, under the circumstances of this case, authorise a jury to presume a dedication of the road by the proprietors of the soil to the public use. *Ibid.*
3. Where a road is opened by an order of the county court, according to law in every respect, except that no damages were assessed by the jury to the owners of the land, none but those owners can impeach the order for that cause. *Ibid.*
4. An overseer of a public road can require no hands to work on his road, unless they live within a district which has been designated for him by the county court, or unless they have been specially assigned by the court to work on his road. *Ibid.*

HOMICIDE:

1. The same matters, which would be deemed in law a *sufficient provocation* to free a white man, who has committed a homicide in a moment of passion, from the guilt of murder, will not have the same effect when the party slain is a white man and the offender a slave. For, though among equals the general rule is that words are not, but blows are, a sufficient provocation, yet there may be words of reproach so aggravating, when uttered by a slave, as to excite in the white man the temporary fury, which negatives the charge of malice; and this rule holds, without regard to the personal merit or demerit of the white man. *State* v. *Jarrott*, 76.
2. The insolence of a slave will justify a white man in giving him moderate chastisement, with an ordinary instrument of correction, at the

moment when the insolent language is used; but it will not authorise an excessive battery, as with a dangerous weapon, nor will it justify an attack upon the slave for even moderate correction, if the insolence be past at the time. *Ibid.*

3. The rule that when parties become suddenly heated and engage immediately in mortal conflict, fighting upon equal terms, and one kills the other, the homicide is mitigated to manslaughter, applies only to equals, and not to the case of a white man and a slave, if the slave kill the white man while fighting under such circumstances. *Ibid.*
4. An ordinary assault and battery, committed by a white man upon a slave, will not be a sufficient provocation to mitigate a homicide of the former by the latter from murder to manslaughter; but a battery which endangers the slave's life, will be a sufficient provocation to produce that result. In the cases between these extremes, that is, a legal provocation, of which it can be pronounced, having due regard to the relative condition of the white man and the slave, and the obligation of the latter to conform his instinct and his passions to his condition of inferiority, that it would provoke well disposed slaves into a violent passion. *Ibid.*
5. Cruelty, which may make homicide murder, even with legal provocation, is, when the *facts* properly appear, an inference of law, and, therefore, properly drawn by the court. *Ibid.*
6. If the weapon, with which a homicide was committed were not of the character, called deadly, that is, likely to produce death or great bodily injury, the homicide would not be murder, although committed without legal provocation. And there are many cases in which the court can distinctly see, from the nature of the instrument used, whether it be of a deadly character or not; and, therefore, need not that the jury should directly find the fact for their information. But where it only appears that the weapon used was a stick of curled hickory of the ordinary size, and that the slayer struck with the larger end thereof, it falls peculiarly within the province of the jury to ascertain, whether such a weapon, so used by the slayer, was or was not likely to produce fatal consequences. *Ibid.*
7. When a deliberate purpose to kill or do great bodily harm is ascertained, and there is a consequent unlawful act of killing, the provocation, whatever it may be, which immediately precedes the act, is to be thrown out of the case and goes for nothing, unless it can be shewn that this purpose was abandoned before the act was done. *State* v. *Johnson*, 354.
8. There is no such thing in law as a killing with malice, and also upon the *furor brevis* of passion; and provocation furnishes no extenuation, unless it produces passion. Malice excludes passion. Passion presupposes the absence of malice. In law they cannot co-exist. *Ibid.*
9. When the existence of deliberate malice in the slayer is once ascertained, its continuance, down to the perpetration of the meditated act, must be presumed, until there is evidence to repel it. There must be some evidence to shew that the wicked purpose had been abandoned. *Ibid.*
10. Provocation never disproves malice; it only removes the presumption of malice, which the law raises without proof. *Ibid.*
11. A malicious killing is murder, however gross the provocation. *Ibid.*

INDICTMENT:

1. An indictment, for forging a bond against one of the obligors therein, may allege the forgery of the whole instrument by him. *State* v. *Gardner*, 27.

2. An indictment, charging the forgery of "a certain bond" instead of a certain paper writing, purporting to be a bond, is proper. *Ibid.*
3. In an indictment for a riot, it is necessary to aver, and, on the trial, to prove, a previous unlawful assembly: and, hence, if the assembly were lawful, as upon summons to assist an officer in the execution of lawful process, the subsequent illegal conduct of the persons, so assembled, will not make them rioters. *State* v. *Stalcup*, 30.
4. An indictment charging a riot and forcible trespass to land, which is in the actual possession of a tenant of the owner, should charge the possession to be in the tenant and not in the owner. If the latter is charged to be in possession, proof of the possession of his tenant will not support the indictment. *State* v. *Wilson*, 32.
5. Upon a motion to quash an indictment, containing two counts, one of which is defective, the officer prosecuting for the State may enter a *nolle prosequi* as to the defective count, which will remove the grounds for the motion to quash, and leave the defendant to be tried upon the charge contained in the good count. *State* v. *Buchanan*, 59.
6. The officer prosecuting for the State has a discretionary power to enter a *nolle prosequi*, for the proper exercise of which he is responsible, though the court would certainly interfere, if he attempted to exercise this power oppressively. *Ibid.*
7. An indictment ought to be certain to every intent and without any intendment to the contrary. But if the sense be clear and the charge sufficiently explicit to support itself, nice objections ought not to be regarded. *State* v. *Fore & al.*, 378.
8. An indictment, charging that J. F. did "take into *his* house one S. C. and they did then and there have *one or more children* without parting, or an entire separation, they, the said J. F. and S. C. never having been lawfully married," is sufficiently certain, though carelessly expressed. The court must intend from these expressions that the parties were of different sexes. *Ibid.*
9. Where a defendant is acquitted upon one count in an indictment, and convicted on another, and appeals, if a *venire de novo* be awarded, it must be to re-try the whole case. *State* v. *Stanton*, 424.
10. In an indictment under the act of Assembly, Rev. St., c. 34, s. 21, for "shewing forth in evidence" a forged instrument, although "the shewing forth" must be proved to have been in a judicial proceeding, yet it is not necessary to state in the indictment in what suit or judicial proceeding it was "shewn forth." It is sufficient to state the charge in the words of the act of Assembly. *Ibid.*
11. It is generally proper and necessary to describe in an indictment an offence, created by statute, in the words of the statute. But there are a few exceptions to this rule. *Ibid.*

See RETAILERS BY THE SMALL MEASURE; GAMING; MAIM 1, 2.

INJUNCTION:

See BONDS.

INSOLVENT DEBTORS:

1. When the principal obligor, in a bond given for his appearance at the county court to take the benefit of the act for the relief of insolvent debtors, is regularly called at court, and, failing to appear, judgment is rendered against him and his surety in the bond, the surety has no right, *ex debito justitiæ*, to come in on a subsequent day of the term and have the judgment set aside, in order to allow him to make a surrender of his principal. In such case, the court may undoubtedly, in the exercise of a sound discretion, set aside the judgment and allow the surrender; but it is not obliged to do so, and ought not to

do so, but upon good cause shewn, as that the party has a good defence but was kept away by accident or misfortune. *Reynolds* v. *Boyd*, 106.

2. It is no objection to a man's taking the insolvent debtor's oath, under our act of Assembly, that he has conveyed, in a deed of trust to satisfy certain creditors, an amount of property, greater in value than the amount of debts secured by the deed, when he sets forth the deed in his schedule and surrenders all his resulting interests. *Adams* v. *Alexander*, 501.
3. When one, who applies to take the insolvent debtor's oath, upon rendering a schedule, sets forth in his schedule that he has made a deed in trust of certain property to satisfy certain creditors and surrenders all his interest in the property mentioned in such deed, it is still competent for the opposing creditor to have an issue made up whether the said deed is not fraudulent, and, if found fraudulent by a jury, to cause the debtor to be imprisoned, until he surrenders the property itself. *Ibid.*

JUDGMENT:

1. A person may confess a judgment or a recognizance on record to the State for a sum of money, as well as to an individual. *State* v. *Love*, 264.
2. Therefore where A. was convicted on an indictment and fined, and ordered into the custody of the sheriff, and B., in consideration that A. should be discharged from custody, confessed a judgment to the State for the fine and costs, *it was held* that this judgment could not afterwards be set aside. *Ibid.*
3. Though a judgment be erroneous, or obtained irregularly, and against the course of the court, yet, while it remains unreversed, it warrants an execution conforming thereto, and upholds the title of a purchaser at execution sale. *Jennings* v. *Stafford*, 404.
4. But if a judgment be rendered by a court having no jurisdiction of the subject matter or against a person who has not had notice to defend his right, or if it order what the court has not the power to order, it is null and void, and an execution issuing thereon will not protect a purchaser. *Ibid.*
5. Where a judgment is rendered upon a former judgment, and execution issues thereon, it is not necessary for a purchaser at a sale, under this execution, to produce the first judgment in support of his title. *Ibid.*

LANDS OF DECEASED DEBTORS:

1. A writ from a court, commanding the sheriff to summon A. and B., heirs of C., deceased, to be and appear, &c., "then and there to shew cause, if any, why D. shant have judgment against the lands of said deceased, in the hands of his said heirs, for $150, besides interest and costs," is not such a *scire facias* as is required by the act of 1784, subjecting the real estate of a deceased person to the payment of his debts, (Rev. St., c. 63, s. 1,) though a debt may have been previously established against the administrator, the plea of fully administered found in his favor, judgment signed, and an award of *sci. fa.* against the heirs. *Barrow* v. *Arrenton*, 223.
2. Such a writ does not set forth nor refer to a judgment previously rendered in any action for any person, and of course does not call on the heirs to shew cause why execution on that judgment shall not issue against the lands descended to them. *Ibid.*
3. Where, upon the return of such a writ, judgment by default was entered upon the record, and an award of execution against the lands

in the hands of the heirs, *held* that the judgment was a nullity, and that the purchaser at the sheriff's sale, under an execution issuing upon it, acquired no title. *Ibid.*

LEGACIES:

1. Where a testator bequeathed certain slaves to one for life and then over to another person, and the legatee for life, without any renunciation of record by the executors named in the will, obtained letters of administration, with the will annexed, upon the estate, and took possession of the slaves and retained them for more than thirty years, until his death; *it was held* that the jury might infer an assent of the executors, or make any other reasonable presumption of fact, to uphold the right of the legatee in remainder. *Lewis* v. *Smith*, 145.
2. The interest in an executory devise or bequest is transmissible to the heirs or executors of one dying before the happening of the contingency on which it depends. *Ibid.*
3. Where a testator, who had, upon the marriage of his daughter E., placed a negro woman, Fanny, in her possession, bequeathed as follows: "I lend unto my daughter E. two negroes, named Fanny and Luke, during her natural life, and increase. Fanny is now in her possession. Luke she is to receive after my decease—and if she should never have a lawful heir begotten of her own body, for them and their increase to be returned to my five children," &c.; *it was held* that the children of Fanny, born while she was in possession of the daughter and husband, but before the death of the testator, passed under the bequest to the daughter. *Hurdle* v. *Elliott*, 174.
4. A bequest by a testator "in the event of his having no heirs," to his niece, is good at common law, and vests a title in the niece, if the testator die without children. *Tilman* v. *Sinclair*, 183.

See DEVISE.

LIMITATIONS, STATUTE OF:

1. The act of 1715 (Rev. St., c. 65, s. 11) will not operate as a bar to creditors, not suing within seven years after the death of the debtor, when there is no executor or administrator of the estate of the decedent during that time. *McKinder* v. *Littlejohn*, 66.
2. If an action be wrongfully brought in the name of one without his knowledge or consent, and he have to pay the costs upon its dismission, his right of action for the *tort* against the person, who wrongfully sued in his name, accrues, not from the commencement of the wrongful action, but only from the time when he is compelled to pay the money on account of it, and consequently the statute of limitations will begin to run only from that time. *Miller* v. *Eskridge*, 147.
3. Probably if there be an explicit acknowledgment of a debt, and a distinct admission that it has not been paid but still exists, and nothing more be said about the mode or time of payment as proposed by the debtor, or of his objection to pay upon the ground of the statute of limitations, or some other defence, then such unqualified admissions might go to the jury as evidence of a new promise. But if the language of the party be so vague and indeterminate, as not in itself to amount to a promise, or to satisfy the mind, either from its own terms or something referred to, what the party meant to engage, there is nothing to repel the statute of limitations. *Wolfe* v. *Fleming*, 290.
4. To repel the bar created by this statute, the words ought not to leave the meaning in doubt, but should clearly indicate the intention to assume or to renew the obligation for the debt. *Ibid.*
5. Where it was proposed to the defendant that if he would pay the principal, the interest should be forgiven, and he declined the proposition,

and in turn, requested the witness to buy the debt (which was about $655 principal, and about $180 interest) for $500, and expressed the opinion that the creditor would accept that sum, *held* that these words did not take the case out of the statute of limitations. This language imports more an offer to compromise, than a promise to pay the debt. *Ibid.*

LIMITATIONS BY DEED:

1. A limitation in a deed, by a donor, of slaves to himself for life, and "after his death in the event of his having no heirs," to his niece, is, by the operation of the act of 1823 (Rev. St., c. 37, s. 22) in connection with that of 1827 (Rev. St., c. 43, s. 3), or, by the former and the principles of the common law, independent of the latter act, valid, and vests a title to the slave in the niece, upon the death of the donor without children. *Tillman* v. *Sinclair*, 183.
2. A grantor by a deed, dated in 1833, conveyed a certain slave to her son-in-law B. and his wife T. till her grand-daughters M. and S. attained the full age of twenty-one years or married; and if B. died before the expiration of that period, living his wife, then the right to vest in her until the age of twenty-one years or the marriage of M. and S.; if the said T. died before her husband, then the whole property to vest in the said M. and S. to be equally divided between them as tenants in common, and from and after the full age of twenty-one years or the marriage of the said M., then the one half of the said property to be equally divided and delivered to the said M., her heirs, &c. and after the full age of twenty-one years or marriage of S., the other half of said property to be divided and delivered to her, her heirs, &c.; and if either M. or S. should die without leaving lawful issue, the property to go to the survivor; and if both die without leaving lawful issue, then to return to the grantor. *Held by the court*, that, as the limitations in the deed, by force of the act of Assembly, (Rev. St., c. 37, s. 22,) must be construed as an executory devise in a last will would be, the grand-daughter M., on her marriage, became a tenant in common with the son-in-law B., though the other grand-daughter S. was still under age and unmarried. *Bonner* v. *Latham*, 271.

LUNACY:

1. The proceedings on an inquisition for lunacy are not void, because no affidavit accompanied the petition to the court, nor because the alleged lunatic was not present at the time of taking the inquest, nor because the jury, in their inquisition, returned to the court, find that "he is lunatic and idiotic," they having also found that "he is of non-sane memory"—the former words to be rejected as surplusage. *Bethea* v. *McLennon*, 523.
2. It is generally proper that an affidavit should accompany the petition, but this is a matter for the discretion of the court, to whom the petition is addressed. *Ibid.*
3. The alleged lunatic has a right to be present at the inquest; and if this right is denied him, it is a good cause for setting aside the inquisition. *Ibid.*
4. But when an inquisition, taken by order of a court of competent jurisdiction, is returned to and confirmed by the court, it is to be respected, like other judgments of a court, until it be reversed or superseded. *Ibid.*

MAIM:

1. In an indictment under the 48th section of the 34th chapter of the Rev. Statutes, an intent to disfigure is *prima facie* to be inferred from

an act which does disfigure, unless that presumption be repelled by evidence on the part of the defendant of a different intent, or at least of the absence of the intent mentioned in the statute. *State* v. *Girkin*, 121.

2. It is not necessary, in an indictment under this statute, to prove malice aforethought, or a preconceived intention to commit the maim. *Ibid.*
3. To constitute a maim under this statute, by biting off an ear, it is not necessary that the whole ear should be bitten off. It is sufficient, if a part only is taken off, provided enough is taken off to alter and impair the natural personal appearance, and, to ordinary observation, to render the person less comely. *Ibid.*

MALICIOUS PROSECUTION:

Before an action can be maintained for a malicious prosecution or arrest, it must appear that the prosecution was legally determined; and if there be no evidence of the fact, it is not error in the court to refuse to leave it to the jury to find whether or not the prosecution was determined. *Hardin* v. *Borders*, 143.

MANDAMUS AND QUO WARRANTO:

1. Under the act, concerning writs of *quo warranto and mandamus* (1 Rev. St., c. 97) the defendant, though judgment is given for him, cannot recover his costs against the relator, when the public only is interested; for the act, though general in its terms, must be confined to those cases only, where the relator claims some office or franchise and has therefore a personal interest in the suit. *State* v. *King*, 22.
2. An adjudication of the County Court, that a particular person has been duly elected sheriff, and that he has the requisite qualifications, does at most only conclude the parties contesting the election, and cannot therefore operate as an estoppel to an information in nature of a *quo warranto*, filed by the proper officer of the State against the sheriff, alleging the want of such freehold qualification. *State* v. *Hardie*, 42.
3. An information in the nature of a *quo warranto*, brought to try the title to an office or franchise, though in form a criminal proceeding, is in the nature of a civil remedy, and is therefore not within the meaning of the 8th section of the Bill of Rights, which declares "that no freeman shall be put to answer any criminal charge but by indictment or presentment." *Ibid.*
4. The act of 1836 "concerning writs of *quo warranto and mandamus*" is not confined to contests between different claimants to offices and franchises; but is intended to regulate the mode by which all usurpations of offices and franchises may be examined and determined in the courts of justice. Hence an information in nature of a *quo warranto*, may, with leave of the court, be filed by the Attorney General or Solicitor for the State, in their respective circuits, against a sheriff, to inquire by what right he holds his office. *Ibid.*
5. Whether any person should be named as relator or not in such information seems to be immaterial, as the information is that of the Attorney General or Solicitor for the State and not of the relator. *Ibid.*
6. Whether its appearing affirmatively, that an information was filed with leave of the court, be necessary or not, it will be sufficient if the proceedings of record shew that it has the sanction of the court. *Ibid.*
7. It is no objection to an information that the full title of the "Solicitor for the State" is not given, and that the term "Solicitor" only is used. But if it were an objection, it would be formal only, and could not avail the defendant on a demurrer to his plea. *Ibid.*

8. The 63d section of the 31st ch. of the Rev. Sta., which prescribes the time when writs and other civil process shall issue and be made returnable, is applicable to, and was not intended to have any operation upon, the prerogative writ of *mandamus*. Such a writ can only issue where a necessity for it is shewn; and, from its very nature, it should issue, be made returnable and be returned, according as the necessity that calls for it may require. *State* v. *Jones*, 129.
9. No general rules of practice in relation to the issuing and return of writs of *mandamus* have yet been prescribed in this State; and it is therefore in each case the province of the court, by which the writ may be awarded, to fix the day on which it should be made returnable. *Ibid.*
10. The case, set forth in the writ of *mandamus*, must shew that there is no other specific legal remedy, because the court will not, ordinarily at least, interfere by *mandamus*, when there is another specific legal remedy. But it is not proper, much less necessary, that the writ should *declare* that there is no other remedy for the mischief, which it commands to be removed. *Ibid.*
11. The writ of *mandamus* should be directed to all the persons, whose duty it is to perform the act required, though some of them may be applicants for the writ. And where three of seven commissioners filed a petition for a *mandamus* to compel the other four in concurrence with them to perform a specific duty, and an alternative *mandamus* was issued directed to the four only, which was returned with an admission of service by the three petitioners, and an expression of their readiness to perform the duty, whereupon a peremptory *mandamus* was ordered; *it was held* that the order for the peremptory *mandamus* was against all and that the proceedings were sufficient. *Ibid.*
12. When an alternative *mandamus* is issued, and no answer or return of cause is made, the court may be moved for an attachment against the persons, to whom it has been directed; and on such a motion, the attachment ought to be refused, unless there has been a personal service of the writ, or such a service as the court, by special order under the circumstances of the case, may direct. But the court, instead of proceeding by attachment for contempt, because cause is not shewn, may direct a peremptory *mandamus* to issue, simply regarding the alternative *mandamus* as in nature of a rule to shew cause why an absolute *mandamus* should not issue; and to justify this course, personal service of the rule, or the writ in nature of a rule, is not necessary, but service by leaving a copy at the dwelling house is sufficient, if the court deem it reasonable; and of this the court, which issues the rule, or writ in nature of a rule, is the exclusive judge, and its judgment upon that matter cannot be revised upon appeal. *Ibid.*
13. Though a peremptory *mandamus* implies that the party has been fully heard, and, therefore, can allege no reason for not obeying it, yet an exception is of necessity implied, that such obedience is not forbidden by a new law, passed after the writ was awarded. *Ibid.*

MARRIAGE:

See Fornication and Adultery.

MARRIAGE SETTLEMENT:

1. The act of 1829, c. 20 (1 Rev. St., c. 37, s. 24) which enacts that no deed in trust or mortgage shall be valid to pass property, as against creditors, but from the registration thereof, embraces only those deeds in trust, which are intended as securities for debt; and does not include deeds of settlement between husband and wife, in which the

property is conveyed to a trustee in trust for the wife—the deeds of the latter class being provided for as to their registration, in the 29th section of the same Revised Statute. *Saunders* v. *Ferrill*, 97.

2. A post-nuptial settlement, made between husband and wife, in which a greater interest in the property is secured to the wife than was provided for in the marriage articles, is void, as against creditors, under the Stat., 13 Eliz. and our act of 1715 (1 Revised Stat., ch. 50, sec. 1.) *Ibid.*
3. A husband cannot be admitted as a witness to establish a settlement in favor of his wife against his creditors; nor will his subsequent declarations be admitted for that purpose. *Ibid.*
4. No ante-nuptial parol agreement or transaction between the husband and wife can be proved, to support a settlement made after marriage, to the obstruction of the husband's creditors; for the act of 1785 (1 Rev. St., c. 37, s. 29, 30), which requires "all marriage settlements and other marriage contracts" to be registered within a particular time, to make them valid against creditors, must necessarily exclude all such contracts as in their nature do not admit of registration. *Ibid.*

MASTER AND SERVANT:

1. A master is not liable for an actual trespass, which his servant may commit, without his previous command or assent; but he is liable in an *action on the case* for the tortious acts, negligence or unskillfulness of a servant, acting in the prosecution of his service, or in the exercise of the authority he has given him, though not under his immediate direction. *Harris* v. *Mabry*, 420.
2. In this case, which was for wrongfully and negligently permitting the plaintiff's slave to pass in the defendant's stage coach, without the permission of the plaintiff, whereby the slave escaped and was lost for some time to the plaintiff, and she was put to great expense, &c., and where the evidence was that the defendant's drivers and stage agents were guilty of gross negligence in taking the slave beyond Salisbury, where her pretended pass was at an end, and permitted her to travel in defendant's stages to Virginia, whereby the slave was lost to the plaintiff. *Held by the court* that the defendant was liable for the injury. *Ibid.*
3. The plaintiff in such a case may recover all such damages, as may be properly considered the consequence of the wrongful acts of the defendant's servants, while in his service. *Ibid.*

MILLS:

1. Where a petition, under the acts of Assembly relating to damages sustained by the erection of public water mills, alleged "*that by the erection of the mill* 30 *or* 40 *acres of his land were overflowed, and that by the said overflowing, the healthfulness of his plantation on which he resides is greatly deteriorated, the overflowing extending to within* 300 *yards of his dwelling house*," the plaintiff is only entitled to recover damages for the injury done by inundating his own lands, not for an injury to the health of his family by other parts of the mill pond. The plaintiff must state in his petition *in what respect* he was injured, and his proofs cannot go beyond his allegations. *Bridges* v. *Purcell*, 232.
2. The proceedings under such a petition being in a court of law, where *viva voce* testimony is always preferred, the party has a right to have the attendance of his witnesses taxed in the bill of costs. *Ibid.*
3. The jury having assessed in this case but one dollar damages, the court did right in giving the plaintiff no more costs than damages under the act of 1833. *Ibid.*

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PARTNERSHIP:

1. An agreement between two persons to carry on a certain trade, upon the terms that one of them is to contribute his labor, and the other to furnish all the materials necessary for the business, and to supply the laborer with provisions for himself and his family; and that, out of the profits of the business, the materials and provisions are first to be paid for, and then the balance of the profits, if any, to be equally divided between the parties, constitutes them partners, and renders the laborer a necessary party in a suit brought for work and labour done in the course of the business, although, previous to bringing the suit, the parties may have dissolved the partnership and separated, before enough of profits was realized to pay for the materials and provisions, and the laborer may have left, indebted to the other for the provisions furnished to his family. *Holt* v. *Kernodle*, 199.
2. One partner cannot maintain an action of any kind against a person who purchases from a copartner the partnership effects, though such sale was made by the copartner in fraud of the partnership rights and to satisfy his own individual debt. *Wells* v. *Mitchell*, 484.
3. When a copartnership is dissolved, notice of the dissolution should be given to those, who were in the habit of dealing with the firm, and to others, either by advertisement in a public gazette or otherwise. *Walton* v. *Tomlin*, 593.

PETITION TO ACCOUNT:

1. Where the answer of executors or administrators to a petition or bill to account, sets forth a joint receipt and joint administration of the assets, the commissioner is not required to report what each received respectively. *Hobbs* v. *Craige*, 332.
2. It is not a good exception to a commissioner's report that the proper parties have not been made to a petition or bill: that is an objection against the petition or bill itself. *Ibid.*
3. Where one of several joint legatees is not a party complainant in a suit for the legacy, nor any process served on him, nor any good reason assigned for this omission, the other legatees cannot sustain their bill or petition. *Ibid.*
4. But the Supreme Court, instead of dismissing the bill or petition, will remand it to the court below, and direct the plaintiffs to pay the costs in the Supreme Court. *Ibid.*

See EXECUTORS AND ADMINISTRATORS 10, 11, 12.

PLEADING:

In actions *ex contractu*, the omission to make the proper plaintiffs may be taken advantage of on the general issue. *Richardson* v. *Jones*, 296.

POSSESSION:

1. The entering upon, ditching and making roads in a cypress swamp, for the purpose of getting shingles therein, and cutting down the timber trees and making shingles out of them, is, in law, a possession of the swamp. *Tredwell* v. *Reddick*, 56.
2. The constructive possession of land, arising from title, cannot be extended to that part of it, whereof there is an actual adverse possession, whether with or without a paper title. *Ibid.*
3. In an action of ejectment, the only question was as to whether the defendant was in possession of the premises at the time of the institution of the suit. It appeared that several years before the suit commenced the defendant had possessed a building, which was *intersected* by the line between him and the lessor of the plaintiff. The building had two rooms, one of which was a corn-crib, which was on the

land of the lessor of the plaintiff, and which, having an out door, was kept locked by the defendant, who was requested, but refused, to remove the building to his own side of the line. *Held* that under these circumstances, if the defendant, at the time the action was brought, kept the crib locked up, *this* was such a possession by him as warranted the plaintiff's action. *Flanniken* v. *Lee*, 293.

4. Possession of land is denoted by the exercise of acts of dominion over it, in making the ordinary use and taking the ordinary profits, of which it is susceptible in its present state—such acts to be so repeated as to shew that they are done in the character of owner, and not of an occasional trespasser. *Williams* v. *Buchanan*, 535.
5. In a stream not navigable, keeping up fish traps therein, erecting and repairing dams across it, and using it every year, during the entire fishing season, for the purpose of catching fish, constitute an unequivocal possession thereof. *Ibid.*

PRACTICE:

1. The Supreme Court cannot reverse a judgment of the Superior Court, because of the alleged finding of excessive damages by the jury, or of the refusal of the Judge to set aside that finding—that not being a question of law but of discretion. *McRae* v. *Lilly*, 118.
2. When the Judge, after reciting all the testimony relating to a material enquiry of fact in the cause, asked the jury "if they found in this testimony, or could lay their fingers on any part of it, shewing the fact," the question, unless proposed in such a tone and manner as to manifest the clear conviction of the enquirer how it ought to be answered, which will not be intended, is not an expression of opinion on the facts to the jury, but only very properly directs their attention to a material enquiry of fact. *Ibid.*
3. The court must in every case pronounce whether the evidence offered corresponds with the allegations on the record. *Walker* v. *Baxter*, 213.
4. The court ought never to instruct a jury as to the legal effects of supposed facts, which the jury cannot find. *Ibid.*
5. Although it is not easy in practice to draw the boundary between a defect of evidence and evidence confessedly slight, yet, where no part of the testimony offered can fairly warrant the inference of the fact in issue, or furnish more than materials for a mere guess or conjecture thereon, it is error in the court to leave it to the jury to infer the fact from such testimony. *Cobb* v. *Fogalman*, 440.
6. A petition was filed, an answer put in, and replication taken. Some terms afterwards, the defendant, by leave of the court, filed an amended answer, stating an additional fact, upon which he relied. No new replication was entered to this, but the parties went on to take depositions and make up an issue as to this fact. *Held* by the court, that, from the conduct of the parties, it must be inferred, that the additional fact stated, was intended as an amendment to the original answer, *nunc pro tunc*, and covered by the replication to that answer. *Guyther* v. *Picot*, 446.
7. Where the jury find for the defendant upon the general issue, the Supreme Court will not enquire into the correctness of the Judge's charge, as to the other plea of the Statute of Limitations. *Cole* v. *Cole*, 460.
8. Where there is no proof to establish a fact relied on, the jury should be so instructed by the court. *Redman* v. *Roberts*, 479.
9. The Supreme Court, as a court of error, has no right to affirm in part and reverse in part an indivisible judgment. *Davis* v. *Campbell*, 482.
10. No agreement of the parties can confer on the Supreme Court a juris-

diction to render any other judgment, than what in law appears to them ought to have been rendered in the Superior Court. *Bethea* v. *McLennon*, 523.

See INDICTMENT.

PRESUMPTION OF PAYMENT:

See EVIDENCE.

PURCHASERS:

If one of several heirs, to whom a tract of land has descended, make a voluntary conveyance of it, and afterwards the other heirs file a bill for the sale of the land for partition, to which the voluntary grantor is made a party defendant and a decree be made, ordering a sale by the master, if the master's report be confirmed and he be ordered to execute a deed to the purchaser, the purchaser at such sale for a valuable consideration will be a purchaser of the land, within the meaning of the statute of 27th Eliz. (Rev. St., c. 50, s. 2), and the master, in executing the deed to the purchaser, will be taken to have acted as the agent of the heir, and his deed will defeat the previous voluntary conveyance. *Latta* v. *Morrison*, 149.

See EXECUTION, 11, 14; JUDGMENT; GUARDIAN AND WARD; LANDS OF DECEASED DEBTORS.

RALEIGH AND GASTON RAILROAD COMPANY:

Upon a confirmation by the county court of the report of the commissioners, appointed by the said court to assess the damages sustained by the owner of land for its condemnation to the use of this company, no appeal lies to the Superior Court. *Raleigh and Gaston Railroad Company* v. *Jones*, 24.

REGISTRATION:

A lease for years is not required to be registered. *Wall* v. *Hinson*, 276.

REMAINDER IN CHATTELS:

See TROVER.

RETAILERS BY THE SMALL MEASURE:

1. The act of Assembly (Rev. St., c. 34, s. 75, 77) which inflicts upon a licensed retailer by the small measure, who shall be convicted of selling spirituous liquors to a slave, the forfeiture of his license &c., applies to those who are retailers at the time of the offence committed, and not at the time of the trial; and the fact of their being such retailers is not to be ascertained on affidavits or otherwise by the court, but must be averred in the indictment, and confessed, or found to be true by the verdict of a jury. *State* v. *Plunket*, 115.
2. On an indictment for retailing spirits by the small measure without a license, where the contract appeared to be to deliver to the purchaser from time to time spirits in parts of a quart as he should call for them, with an engagement on his part to take, in the whole, a quart in quantity, and an engagement on the part of the seller not to exact payment until that quantity should be received, *it was held* by the court, that this was a violation of the act of Assembly, prohibiting the sale of spirits by the small measure without a license. *State* v. *Kirkham*, 384.
3. Where in such a case the special verdict does not find *that the selling was without license*, judgment must be rendered for the defendant; for such an averment is necessary in an indictment under the statute, and in a special verdict must be found by the jury. *Ibid.*

ROADS:

See APPEAL.

SEQUESTRATION:

See BONDS.

SET OFF:

1. Where an administrator brought an action of assumpsit for goods sold and delivered by his intestate, the defendant pleaded a set off of goods sold and delivered by her to the intestate, the plaintiff replied that there were debts of superior dignity to which his assets were subject, and the defendant demurred to this replication: *Held* by the court, that the demurrer should be sustained. Our act of Assembly, relating to set offs, has expressly declared, that mutual debts, subsisting at the death of a testator or intestate, between him and another party, shall be set off, notwithstanding the debts may be deemed of different natures. *Austin* v. *Holmes*, 399.
2. In an action of covenant, the defendant, it appeared, covenanted to deliver to the plaintiff a certain quantity of bacon, by a certain time. The defendant cannot, as a defence to this action, either under the plea of performance, or as a set off, or even in diminution of damages, offer in evidence a separate covenant of the plaintiff, dated the same day, to deliver to the defendant a certain quantity of corn, and, in addition, parol proof that the latter covenant was the consideration of the former, and that the latter covenant had been broken. *Lindsay* v. *King*, 401.
3. A set off under our statute, must be a *money demand*, and of a *liquidated nature*, and one on which an action of *debt* or *indebitatus assumpsit* would lie. *Ibid.*

SHERIFF:

1. A sheriff's bond to "his excellency M. S., captain general and commander in chief in and over the State of North Carolina," in the sum of $10,000, "to be paid to his excellency the Governor, his successors and assigns," is a bond payable to the Governor in his official capacity, and is an official bond within the act of 1823 (Tay. Rev., ch. 1223), which was in force when it was taken. *Governor* v. *Montfort*, 155.
2. The sureties to a sheriff's bond, with a condition in the ordinary form, are liable under the act of 1829 (Rev. St., c. 109, s. 15) for an amercement of the sheriff for a default committed during his official year, though the final judgment for the amercement may not have been rendered until after the expiration of the year. *Ibid.*
3. The owner of property may maintain, against a sheriff, any action for detaining or converting his property, taken under an execution against a third person, which he could have, if the taking was without process; because he is a stranger to the process. *Burgin* v. *Burgin*, 453.

See EXECUTIONS; BAIL; ATTACHMENT.

SLANDER:

1. In an action of slander, in which the defendant is charged with having imputed perjury to the plaintiff, the plea of justification is not sustained, if the jury are satisfied that the plaintiff was honestly mistaken in what he swore to. In such an action, the plea of justification must contain all the averments, which, if true, constitute the crime of perjury. *Jenkins* v. *Cockerham*, 309.
2. Where a man utters slanderous words of another, and at the same time

avers that he can prove their truth by a third person, whom he names, this last averment is no mitigation, but rather an aggravation of the slanderous charge, and tending to prove malignity in the speaker. *James* v. *Clarke*, 397.

SLAVES:

See EMANCIPATION; HOMICIDE, 1, 2, 3, 4.

SURETY AND PRINCIPAL:

1. If two persons are bound by a bond or a judgment for the payment of a sum of money, the one is liable at law to the creditor in the same manner and to the same extent as the other, although as between themselves they stand as principal and security. *Shaw* v. *McFarlane*, 216.
2. An agreement for indulgence to the principal does not at law amount to satisfaction of the debt; and nothing *in pais* can discharge an obligation or a judgment but performance or satisfaction. *Ibid.*
3. Where a surety brings an action of assumpsit, for money paid for the use and at the request of the defendant, against his co-surety, to obtain contribution, it is not sufficient for him to shew that he has given his note for the debt due by the principal, and that the same has been accepted by the creditor as a payment and discharge of the debt. *Brisendine* v. *Martin*, 286.
4. To entitle him to recover in this action, he must prove an actual payment in money, or in money's worth, such as bank notes, the note of a third person, or a horse or the like, which is valuable in itself to the surety who parts with it. *Ibid.*
5. Nor will the giving of a note, by an agent of the surety, in the agent's own name, enable the surety to support the action, although that note was received by the creditor in satisfaction of his demand. *Nowland* v. *Martin*, 307.
6. In all cases of joint obligations, &c., suit may be brought against the whole, or one or more of the persons making such contract. Therefore, where one was sued alone on a joint obligation, and the jury found upon the plea of the defendant that he was only a surety, this was an immaterial plea, and of course an immaterial finding, and the defendant could not avail himself of the provisions of the act of Assembly, Rev. St., c. 31, s. 131, 132, relating to judgments against a principal and surety. *Davis* v. *Sanderlin*, 389.
7. In such a case, an indorsement on the execution, according to the provisions of that act, is absurd and unmeaning. *Ibid.*

See EXECUTORS AND ADMINISTRATORS.

TENANT AT WILL.

A party who has been let into possession of land, under a contract of sale, or for a letting which has not been completed, is only a tenant at will of the vendor, and his interest is determinable *instanter* by a demand of the possession. In such case, a three weeks' notice to quit is a determination of the tenancy; or, if the tenant do any act, which amounts to a disclaimer of the vendor's or lessor's title, it operates as a forfeiture and no notice to quit is necessary. *Love* v. *Edmonston*, 152.

TENANTS IN COMMON:

See DETINUE.

TOWNS:

1. An act of the Legislature, granting to the town of B. certain land for town commons, *ipso facto* creates that town a body politic for the

purposes of that grant, if it were not a corporation before, and a subsequent act continuing its corporate existence under the name of "The Commissioners of the town of B." enables these commissioners in their corporate name to maintain an action of ejectment for the said land. *Commissioners of Bath* v. *Boyd*, 194.

2. A sale of an entire lot in the town of Newbern, for the town taxes due on it, is void, and the sheriff's deed conveys no title to the purchaser; as the town taxes are to be levied by distress in the same manner, with a few peculiar exceptions, as the State taxes. *Saunders* v. *McLin*, 572.

TRESPASS.

1. The action of Trespass Q. C. F. cannot be maintained but by one who has possession of the land. *Tredwell* v. *Reddick*, 56.
2. Possession alone is sufficient to maintain the action of trespass Q. C. F. against mere *tort feasors*. And in such action, all procurers, aiders and abettors, nay, even those, who are not privy to the commission of a trespass for their use and benefit; but who afterwards assent to it, are equally liable with those who commit the act of trespass. *Horton* v. *Hensley*, 163.
3. A purchaser of a growing crop of corn, at an execution sale, must declare in trespass on his personal chattels, against one, who tortiously severs the corn from the stalks and throws it on the ground. *Brittain* v. *McKay*, 265.
4. A grant of the vesture or herbage of land passes a particular right *in the land itself*, and for that purpose also "a particular possession and occupation" of the land itself. Such a grantee may therefore maintain trespass *quare clausum fregit* for any interruption of his possession. *Ibid.*
5. But there is a distinction between those profits, which are the spontaneous products of the earth, and the corn, &c., which are produced annually by labor and industry, and thence are called *fructus industriales*—the latter are, for most purposes, regarded as personal chattels, and a sale of them, while growing, is only a sale of goods. *Ibid.*
6. He, who directs, aids or encourages another in the commission of a trespass, is himself a trespasser. *Ibid.*

TROVER:

1. In trover the death of a slave converted does not affect the plaintiff's right to recover his value, because by the conversion the defendant made him his own. *Bethea* v. *McLennon*, 523.
2. An action of trover will not lie, by one, who is entitled to a remainder in slaves after the expiration of a life estate, against another remainderman, who, during the continuance of the life estate, which he had purchased, removed the slaves to parts unknown, so that they could not be found. *Cole* v. *Robinson*, 541.
3. But, the estate in remainder being a legal estate, a special action on the case may be maintained to redress such injury. *Ibid.*

See DEVISE, 7.

WARRANTY:

1. An action may be sustained, under our act of Assembly, Rev. St., c. 31, s. 89, against any one or more of the joint obligors in a covenant of warranty, contained in a deed for the conveyance of land, for a breach of such covenant, *Grier* v. *Fletcher*, 417.
2. That act is not confined to contracts for the payment of money merely. *Ibid.*
3. Persons owning land in common, and conveying it, need not be liable for each other in their covenants; as they may make several convey-

ances, or in the same deed may covenant severally each one for himself and for his share. *Ibid.*

4. When one, who has an *estate of inheritance in possession*, as, in this case, a *fee conditional*, the condition being that if he died without leaving issue living at his death, the estate should go over, and sells the same, and binds himself and his heirs in a general warranty; his heirs are bound, whether the warranty be lineal or collateral, and whether they have assets by descent or not. *Flynn* v. *Williams*, 509.

WILLS:

1. Where there is any evidence of fraud or imposition in procuring the execution of an instrument as a will, the jurors are at liberty to consider the dispositions of property actually made therein, to guide their judgment in making up their verdict. *Ross* v. *Christman*, 209.
2. But where capacity in the testator, formal execution and volition all appear, no tribunal can pronounce against a will, because of its disapprobation, however strong, of the dispositions made by the testator. *Ibid.*
3. The probate of a will of lands by a married woman, cannot be had in the county court. *Newlin* v. *Freeman*, 514.
4. A married woman can only make an appointment in the nature of a will of real estate, under a power of appointment specially given in some deed, and that appointment the courts of equity have alone the jurisdiction to determine on and enforce. *Ibid.*
5. But a married woman, by her husband's consent, can make a will of her personal property. *Ibid.*
6. And where he has covenanted in a marriage settlement, that she may make such will, but withholds his consent from the particular will she makes, this is still her will as to personal property; sufficient, at least to repel his right of administering, and to authorize the granting of administration to her appointee, with the will annexed. *Ibid.*
7. In case of appointments, authorising married women to make a will of personal property, the appointment must be proved as a will in the proper court, and then regarded in all courts as a will. *Ibid.*
8. Where it is proved by one of the only two subscribing witnesses to a will, offered as a will of real estate, that he was requested by the testator to prepare his will according to his instructions, and he did so, and signed his name as a witness before the testator signed, but not in his presence, and then read the will to the testator, and told him he had signed as a witness, and the testator approved and executed it, and the other witness then signed in presence of the testator, *held* that this was not a valid execution of a will to pass real estate, the statute requiring *both* the witnesses to sign *in the presence of the testator*. *Ragland* v. *Huntingdon*, 561.
9. A will was offered for probate in the county court—a caveat entered by the defendants—and on the issue being found in favor of the will, both as to real and personal estate, the defendants appealed. On the trial in the Superior Court, the jury found it to be a good will for personal, but not for real estate. *Held* that the plaintiffs had a right to recover from the defendants their costs both in the County and Superior Courts. If the defendants had appealed only from so much of the judgment of the County Court as related to the real estate, then the costs of the Superior would have followed the judgment of that court. *Ibid.*

See EVIDENCE, 18.

WITNESS:

See EVIDENCE.

WRIT:

See EVIDENCE, 12; AMENDMENT.

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